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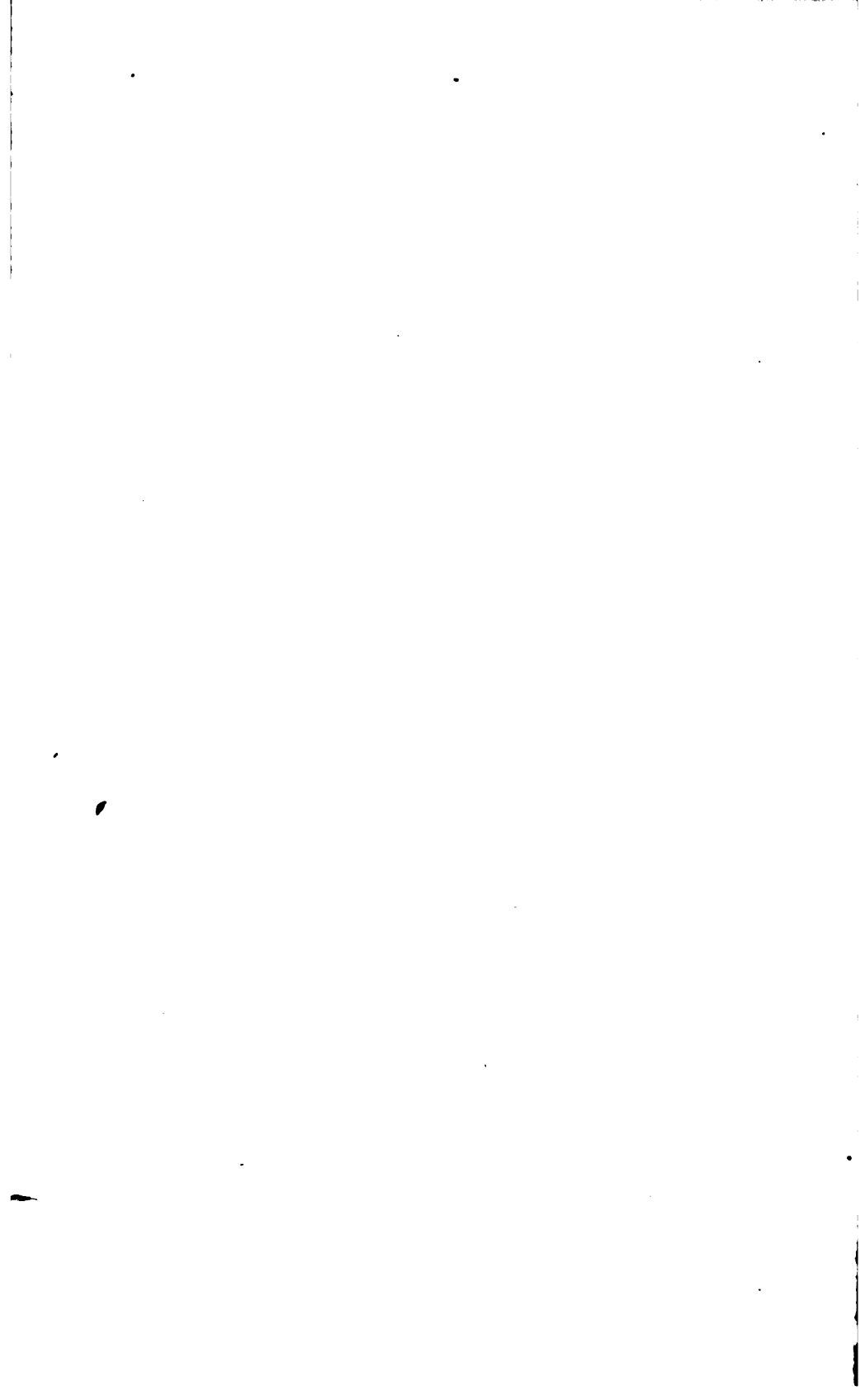
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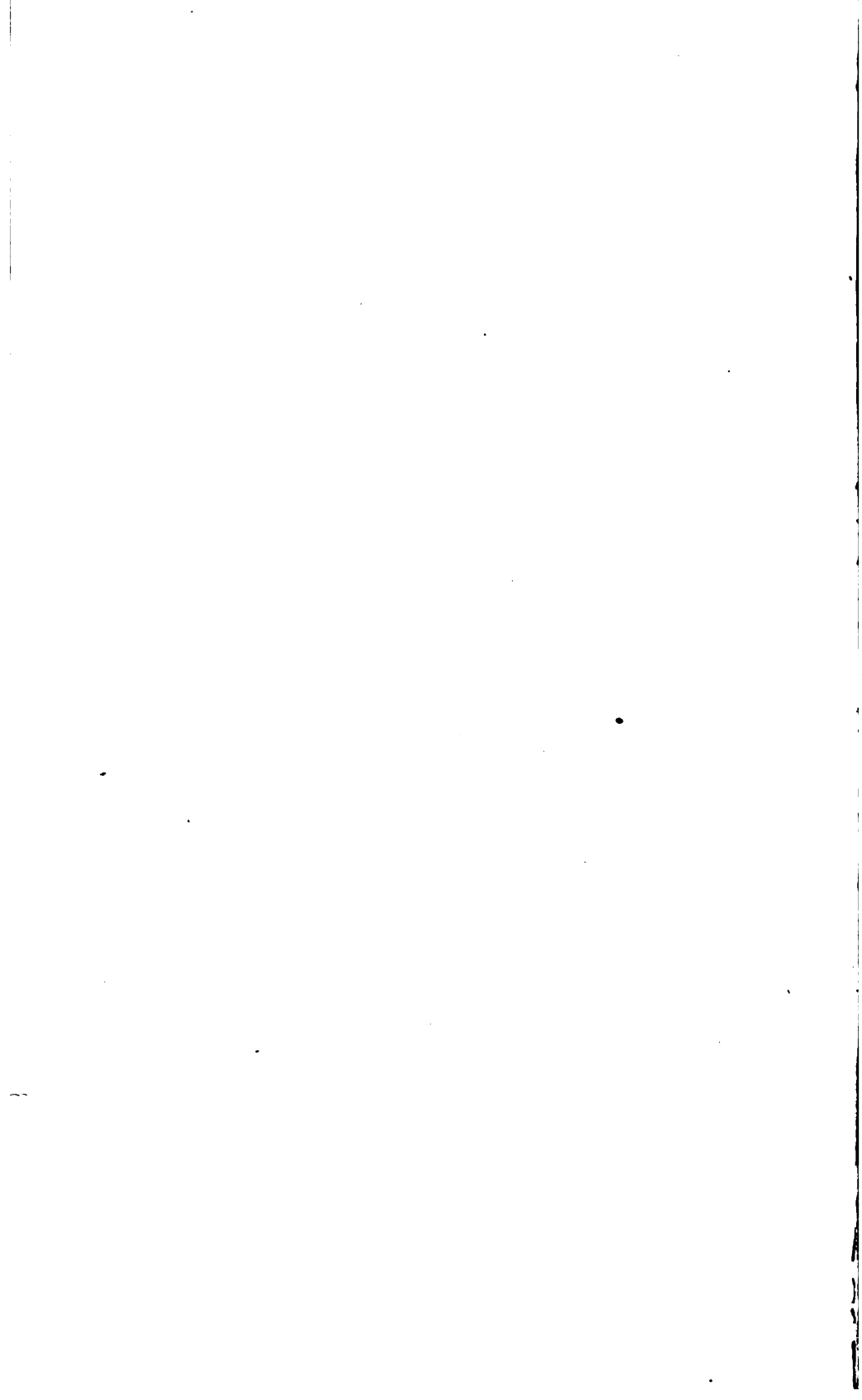
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REPORTS OF CASES DECIDED
IN THE
CIRCUIT COURTS OF THE UNITED STATES

FOR THE
FOURTH CIRCUIT;

MOST OF THEM SINCE CHIEF JUSTICE WAITE CAME UPON THE
BENCH; AND OF SELECTED CASES IN ADMIRALTY AND
BANKRUPTCY, DECIDED IN THE DISTRICT
COURTS OF THAT CIRCUIT.

WITH
AN APPENDIX TO THE SECOND VOLUME,
CONTAINING THE RULES IN ADMIRALTY AND BANKRUPTCY, OF THE
DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA,
AND THE RULES OF THE CIRCUIT COURT FOR
THAT DISTRICT, ETC., ETC.

By ROBERT W. HUGHES,
ONE OF THE DISTRICT JUDGES.

VOL. I.

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These Volumes

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TO

PROFESSOR JOHN B. MINOR,

OF THE

UNIVERSITY OF VIRGINIA,

IN ACKNOWLEDGMENT OF THE SERVICE WHICH HE HAS RENDERED TO
BENCH AND BAR BY HIS "INSTITUTES OF THE COMMON AND
STATUTE LAW," AND BY HIS LECTURES, FOR MANY
YEARS, IN THE PRINCIPAL LAW SCHOOL
OF THE SOUTHERN AND SOUTH-
WESTERN STATES.

JUDGES OF THE FOURTH CIRCUIT.

Justice of the Supreme Court.

	POST-OFFICE.	APPOINTED.
CHIEF JUSTICE M. R. WAITE, ...	WASHINGTON CITY, . .	January 21st, 1874.

Circuit Judge.

	POST-OFFICE.	APPOINTED.
HUGH L. BOND, ...	BALTIMORE, MD., . .	July 13th, 1870.

District Judges.

DISTRICT.	POST-OFFICE.	APPOINTED.
MARYLAND, WM. F. GILES, ...	BALTIMORE, MD., . . .	January 11th, 1854.
WEST VIRGINIA, JOHN J. JACKSON, JR., . . .	PARKERSBURG, W. VA.,	August 3d, 1861.
WESTERN DISTRICT OF		
VIRGINIA, ALEX. RIVES, ...	CHARLOTTESVILLE, VA.,	February 6th, 1871.
EASTERN DISTRICT OF		
VIRGINIA, ROBERT W. HUGHES, ...	NORFOLK, VA., ...	January 14th, 1874.
EASTERN DISTRICT OF		
NORTH CAROLINA, GEO. W. BROOKS, . . .	ELIZABETH CITY, N. C.,	January 22d, 1866.
WESTERN DISTRICT OF		
NORTH CAROLINA, ROBERT P. DICK, . . .	GREENSBORO', N. C., .	June 7th, 1872.
SOUTH CAROLINA, GEORGE S. BRYAN, . . .	CHARLESTON, S. C., .	May 12th, 1866.

PREFACE.

THE decisions of the courts of the United States in the Judicial Circuit now designated as the Fourth, so far as yet published, are embraced in the two volumes of *Burr's Trial*, by David Robertson; the two volumes of *Marshall's Decisions*, published by John W. Brockenbrough; the volume of *Taney's Circuit Court Decisions*, published by J. M. Campbell; and the recent volume of *Chief Justice Chase's Decisions*, published by Bradley T. Johnson. In an appendix to Sixth Call's Virginia Reports are six decisions, three of which are not elsewhere to be found; one of them by Chief Justice Jay, and the other two respectively by Associate Justices Iredell and Washington. These three cases, in order that they may be found in some volume of United States Reports proper, are incorporated into the present volumes. I have also incorporated a decision of Chief Justice Ellsworth never before published in permanent form, and two other cases, from François Xavier Martin's *Notes of North Carolina Decisions*, published in 1797. This author was afterwards Chief Justice of the Supreme Court of Louisiana.

The present volumes contain all the decisions up to this time made by Chief Justice Waite which he has reduced to writing; and all decisions of Circuit Judge Bond preserved in manuscript form, which I have been able after careful endeavor to obtain. To them I have added a number of decisions in Circuit Court made by the several District Judges sitting there.

I probably owe an apology to the profession for including in the present volumes so many decisions in bankruptcy and admiralty of the District Courts, and especially so many which have been made by myself. But, in truth, the necessity which was felt to exist of publishing these District Court decisions, suggested the publication of those also which I could collect of the Circuit Courts.

The admiralty jurisdiction of the ports and waters of Chesapeake Bay, and of the ports of the Carolinas, has been fruitful of many important cases, reports of which cannot fail to be interesting to admiralty lawyers generally, while they are almost indispensable to those who practice in the Admiralty Courts of the Fourth Circuit. Many cases are decided in the Admiralty Courts proper, which do not reach appellate courts. These decisions are upon points most frequently arising in practice, and the rulings in them are really of more practical value to the admiralty lawyer than those often are in the exceptional cases which go up by appeal for final determination.

These remarks apply with greater force to the decisions of the Courts of Bankruptcy contained in these volumes. In the single district of Eastern Virginia, there have been filed 6455 cases in bankruptcy, and 161 suits connected with bankruptcy; 6616 in all. When the writer came to the bench, in January, 1874, under rulings of Circuit and Supreme Courts then recently and soon afterwards made, a large proportion of these cases were brought before him by petition praying the setting aside or modification or review of former orders and decrees made in them. Naturally, the action of the court upon these petitions suggested or required written explanations of the principles on which the court acted. These written decisions had often to be referred to in subsequent cases, and a desire for the publication of them in compendious and convenient form accessible to the bar has become general. These are the considerations which have induced the writer to insert many of the more important of his own decisions in bankruptcy in the second volume, and to collect from other districts of the circuit like decisions of his brethren of the bench. This he has done with diligence, and he regrets that he has been able to collect comparatively but few of these last.

Although the decisions in these volumes are not published under distinct classifications, yet the reader will find that they are in fact grouped in the following order, viz. : cases in equity, cases at law, indictments, *ex parte* proceedings under extraordinary writs,—these in the first volume; and, in the second, admiralty cases and bankruptcy cases. Near the end of each volume will be found a few cases dislocated from these groups.

But for the feeling that Reports professing to cover the period of the political offences against the Civil Rights and Enforcement Acts which have been tried in this circuit, would be deficient, if not embracing at least as many of the cases as exhibit the principles of law on which they turned, I should have gladly omitted the whole subject from these volumes. I reflect, however, that these are books for lawyers and not for politicians or the populace; that the whole class of civil disorders out of which the trials grew have ceased, I hope and believe, forever; and that even if there be in the evidence as reported anything which, in worse times than the peaceful era which we now have entered and confidently anticipate, would tend to produce or keep alive excited feeling, no such effect is or will be possible.

I am sure that no public evil can come from publishing the three or four trials of the class alluded to which are given in these volumes; and I should regret to find that in the manner in which the evidence has been reported any individual or class has been wronged either by omission or exaggeration.

R. W. H.

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UNITED STATES CIRCUIT AND DISTRICT
COURTS,

FOR THE FOURTH CIRCUIT.

U. S. Circuit Court, Eastern District of North Carolina.

SWASEY v. NORTH CAROLINA RAILROAD CO. AND OTHERS.*

Where a State of the Union is a party in interest but not a party to the record, the jurisdiction of the United States Circuit Court attaches where that court has jurisdiction of the State's agent who has charge of the property as a trustee, and where the property which is the subject of the suit is stock or shares in a railroad company, held by it in pledge for the security of a debt due to the complainant, for which a lien has been given by the State "in addition" to the pledge.

Where stock in a corporation has been pledged for the "redemption of certificates of debt," and the certificates bound the debtor for the payment of "the sum therein mentioned and the interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any instalment of interest.

ALL the necessary facts are stated in the opinion of the court delivered by

WAITE, C. J.—The North Carolina Railroad Company was incorporated by an act of the General Assembly, passed January 27th, 1849, to construct a railroad to commence at the Wilmington and Raleigh Railroad, and proceed to Charlotte. To aid in building the road, the Board of Improvement was, by the act of incorporation, authorized to subscribe on behalf of the State \$2,000,000 to the capital stock of the company.

* This case is also reported in 71 N. C. Reports, 571.

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Sections 38 and 41 of the act are as follows :

"SEC. 38. That in case it shall become necessary to borrow the money by this act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually, at such times and places as the treasurer may appoint; the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued, at any one time there may be sufficient to meet the instalment required to be paid at that time."

"SEC. 41. That as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto, all the stock held by the State of North Carolina Railroad Company, hereby created, shall be and the same is hereby pledged for that purpose, and any dividends of profit which may from time to time be declared on the stock held by the State as aforesaid, shall be applied to the payment of interest accruing on said certificates; but until such dividend of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated."

The authorized subscription was made and certificates of debt issued to the amount of \$1,858,000, on which the money was borrowed to meet the payments. By these certificates it was "certified that the State of North Carolina justly owes —, or bearer, \$1000, redeemable in good and lawful money of the United States, at, etc., on the 1st day of July, 1884, with interest thereon at the rate of 6 per cent. per annum, payable half yearly at, etc., on, etc., until the principal be paid on surrendering the proper coupon hereto annexed." On the 14th of February, 1855, the General Assembly passed another act, entitled "An Act for the completion of the North Carolina Railroad," by the terms of which the public treasurer was authorized and instructed to subscribe for \$1,000,000 more to the capital stock of the company, and to make payment therefor by issuing and making sale of the bonds of the State, under the same provisions, regulations, and restrictions prescribed for the sale of the bonds theretofore issued and sold to pay the State's original subscription, and the same pledges and securities were thereby given

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for the faithful payment and redemption of the certificates of debt then authorized, as were given for those issued under the direction of the first act.

This stock was by the terms of the act to be a preferred stock. The subscription was made, and certificates of debt, in the same general form as the first, issued to provide the means of payment.

The plaintiff is the owner of five certificates of the first issue and two of the second. The interest on the first, payable January 1st, 1869, and after, and on the second, payable April 1st, of the same year, and after, was unpaid when this suit was commenced.

This action is prosecuted for the benefit of all bondholders who may come in and make themselves parties. About \$1,800,000 of the indebtedness is now represented. No certificate for the stock, upon either of the subscriptions, had been issued by the company at the time of the commencement of this action. Since that time, upon the order of the court, the proper certificates have been issued, and placed in the hands of a receiver, appointed in this cause, who has collected the dividends thereon as they have from time to time been declared and paid. These dividends as far as received have been applied to the payment of interest, but there is still a large amount in arrears, and the plaintiff now asks that a sufficient amount of the stock may be sold to pay what is past due.

It is first insisted by the defendant that the State of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause.

The State, although directly interested in the subject-matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides that no suit can be prosecuted in this court against a State, by the citizens of another State, or by citizens or subjects of a foreign State. It has long been held, however, that this amendment applies only to suits in which a State is a party to the record, and not to those in which it has an interest merely.

It is next urged that if the State is not actually a party to the suit, it is a necessary party in whose absence the cause cannot

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proceed, and that as a State cannot be brought into court, no relief should be granted upon the case made.

If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborn v. The Bank of the United States*, reported in 9th Wheaton, 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent.

The real question, therefore, presented for our determination is whether the court has jurisdiction of the property which it is sought to charge, or of the agent of the State having it in possession.

The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt of the State contracted on its account. This was part of the law of its creation. It has always been pledged.

The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case, holds the share of its property represented by the stock subscribed by the State in trust, as well for the stockholders as for the State. The charter made the company the depository of the pledge to hold it for both parties according to their respective interests. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained in the absence of the State as a party. This was evidently the understanding of the parties when the pledge was made. It was then the case as now, that a State could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the courts in proper cases, notwithstanding the ownership by the State. The faith of the State had been pledged. This pledge the courts could not enforce. The stock to be obtained with the money borrowed could not be

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reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose.

Understanding this, a lien was given upon the stock as security "in addition" to the pledge of faith. But it was no addition if the bondholder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the State not only should, but that it in fact did, grant to the bondholders the power to use the machinery of the courts to subject this portion of their security if default should be made in the payment of the debt.

In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed.

The next objection is that the stock was pledged as security for the payment of the principal of the debt alone, and not the interest, and that as the principal is not yet due there can be no decree for a sale.

The stock was pledged for the "redemption of the certificate of debt." The certificate bound the State "for the payment of the sum therein mentioned, with interest thereon." Thus it is apparent that the interest is as much a part of the obligation of the certificate as the principal. If more is necessary to sustain this view, it is to be found in a subsequent part of the section where it is provided that the "*principal* of the certificate shall be redeemable," etc. If it had been supposed that the certificate only related to the principal, it would have been sufficient to provide for the time of the redemption of the certificate, the same as in Section 41, the security for the redemption of the certificates was designated and granted.

If then the certificate bind the State for the payment of both principal and interest, it would seem to follow most unquestionably that whatever was given as security for its redemption could be held for the performance of all its obligations.

But it is argued that the dividends are specially designated as security, and the only security, for the payment of the interest. The language of the act is that the dividends "shall be applied to the payment of the interest accruing on such certificates."

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This is additional security. Without it (as the State could not be sued) there was no power to compel this application. With it there was. The officer in whose custody the dividends were placed, was, so long as the fund remained in his hands, amenable to the process of the courts to compel him to do what the law required of him.

It is again claimed that, as it was made the duty of the treasurer, until dividends were declared, to pay the interest as it accrued out of any moneys in the treasury not otherwise appropriated, it could not have been intended that the stock should be held for anything but the principal. This, too, was additional security. Without it the bondholder had no power to enforce the payment of the interest. With it, after default, upon a proper showing, the treasurer could be compelled to apply the unappropriated moneys in his hands to discharge that obligation.

Neither can an argument in favor of the claim of the defendant be drawn from the fact that the stock is pledged for the redemption of the certificate. It is true the principal of the certificate was made redeemable at the end of thirty years, and that the interest thereon was payable semi-annually. The certificate could not be redeemed until both principal and interest were paid.

Redemption and redeemable are, therefore, in this connection, only other names for payment and payable, and the General Assembly appears to have used the words as though they conveyed the same meaning.

If the stock was not given in security for the interest, then the faith of the State was not pledged for its payment, for that, like the stock, was only pledged for the redemption of the certificate. So, too, if no payment of interest should be made during the whole thirty years, no part of the stock could be applied to its payment then, even though its value should be sufficient to discharge both principal and interest. If the stock is held at all for the payment of the interest, it may be subjected at any time after a semi-annual instalment falls due.

For these reasons we are clearly of the opinion that the plaintiff, and those whom he represents, are entitled to have their proportion of the stock, or so much thereof as may be necessary,

Syllabus.

sold in order to pay the past due interest upon their bonds. They can act, however, only for themselves. So much of the stock as equitably belongs to them as security they can control in this action, but no more. The security is divisible, and should be apportioned to the various bondholders according to the amount of their respective claims. Each bondholder should have an amount of stock which bears the same proportion to the whole stock that his bonds do to the whole amount outstanding. We are not willing, however, to order that a sale be made until ample time has been given the State to provide, by levy and collection of taxes, the necessary funds for the payment of the interest now past due, and such as may fall due before the money can be realized and applied. An account may be taken of the amount due for unpaid interest upon the bonds represented in this cause, and of such as will mature on or before the first day of April, 1875, and a decree entered that if full payment thereof is not made by that day, so much of the stock apportioned as security to the plaintiff, and those he represents, as may be necessary to pay the same, be sold. If on or before the day of sale it shall be made to appear to the court that the State has, in good faith, levied a tax to pay the arrears of interest on the debt, and provided for its collection, the sale will be further suspended until a sufficient time shall have elapsed for the collection to be made.

*U. S. Circuit Court, Eastern District of North Carolina, at
Raleigh, June 18th, 1874.*

SELF v. JENKINS, STATE TREASURER.*

Where money in a State treasury devoted by the State Constitution to the payment of a particular indebtedness has been applied by direction of the State legislature to another purpose, and, afterwards, money comes into the State treasury which a public creditor, who was entitled to the money first unapplied, seeks to have paid to himself in discharge of his claim: *Held*, that although a court of chancery might properly have

* This case is also reported in 71 N. C. Reports, 578.

Opinion of the court.

enjoined the State treasurer from the original misapplication, on bill filed in time, yet that it has no power, after the misapplication, to restrain the State treasurer from applying to the general purposes of the State subsequently received moneys, not especially dedicated by law, nor to compel the treasurer by mandamus to substitute such general funds for the moneys already improperly paid.

IN equity.

The facts are fully set forth in the opinion of the court delivered by

WAITE, C. J.—Article 5, section 5 of the Constitution of North Carolina is in these words:

“Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon.”

Article 5, section 8, is in these words:

“Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purposes.”

The Wilmington, Charlotte and Rutherford Railroad Company was incorporated in 1855, to construct a railroad from Wilmington to Rutherford. This railroad was unfinished at the time of the adoption of the Constitution.

By an act of the General Assembly, passed on the 29th January, 1869, the capital stock of this company was increased to seven million dollars, and, in order to complete the road, the public treasurer was directed to subscribe four millions of dollars to the stock. Payment of this subscription was to be made in the bonds of the State having thirty years to run, the interest, at six per cent., being payable semi-annually. To provide for the payment of the interest and the principal at its maturity, the act

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imposed an annual tax of one-eighth of one per cent. upon taxable property of the State, to be levied, collected, and paid into the treasury as other public taxes.

This authorized subscription was made, and bonds to the amount of \$3,000,000 delivered to the president of the company in part payment thereof.

The special tax provided for was levied in 1869, and \$151,491.13 collected therefrom and paid into the treasury. Out of this, \$29,400 was paid on account of the interest accruing upon the bonds; but on the 20th of January, 1870, a resolution was adopted by the General Assembly instructing and directing the treasurer not to pay any more until authorized by the General Assembly, and he thereupon suspended the payment.

On the 8th March, 1870, the General Assembly repealed the act making appropriations to the railroad company, and directed all the bonds in the hands of the president to be returned to the treasurer.

On the 12th of the same month, the General Assembly, by a law duly enacted, directed the treasurer to use \$150,000 of the special tax funds, in payment of the ordinary expenses of the State government, and to pay advances theretofore made by the board of education, and authorized him to replace the same out of the first moneys which might come into his hands by way of dividends of corporations or of taxes theretofore or thereafter to be levied.

By another act, passed December 20th, 1870, he was directed to use \$200,000 more of the same funds in payment of the ordinary expenses of the State government, and the appropriations for the charitable and penal institutions, and to replace the same from the first moneys paid into the State treasury from dividends or taxes levied and collected for general purposes.

In obedience to these directions the treasurer used \$122,091.13 of the fund collected to pay interest on these bonds for the purposes specified in the acts.

On the 20th December, 1871, the treasurer was forbidden by the General Assembly to apply any money collected under the Revenue Act of 1871 to the repayment of any moneys borrowed under the act of December, 1870.

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On the 3d of March, 1873, another act was passed, entitled "An Act to raise revenue," and by its terms the taxes therein levied were applied to defray the expenses of the State government, and to pay the appropriations for charitable and penal institutions. A similar act, with similar application of the funds to be raised, was passed in 1874.

The plaintiff is the holder of certain of the bonds issued to the above-named railroad company, on which no interest has been paid, and in this bill he asks that the treasurer may be restrained from the payment of any moneys out of the treasury of the State, until he has replaced the \$122,091.13, borrowed by him from the special tax fund, applicable to the payment of the interest on the bonds issued to the said company.

The facts are all admitted by the pleadings, and the simple question presented for our determination is whether upon such facts the relief asked for can be granted.

The use of the special tax fund to pay the general expenses of the State government was in violation of the Constitution and therefore unlawful, but the wrong, if any exists, has been done. We are not called upon to prevent the act, but to relieve against its consequences. The first, upon a proper application made in time, we might have done. The question now is, whether, upon this application, the latter is within our power.

The treasurer is a public officer. His office belongs to the executive department of the State. His duty is to execute the laws, not to make them. He, within his official sphere, carries into effect the will of the legislature, and can only do what the law permits.

The courts will not by mandamus compel a public officer to do that which the law does not authorize. Neither will they restrain him from doing that which the law requires. An unconstitutional law is no law, and the court will, when properly called upon, restrain its execution, because it cannot authorize action by any one. It is for this reason that the wrongful application of this money might have been prevented. The law directing it being unconstitutional, conferred no authority upon the treasurer to do what was required. It is quite another thing, however, to compel him in his official capacity to substitute

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other moneys now in the treasury for that which he has improperly used.

That in substance is what we are called upon to do in this case. True, the form of the prayer is that the treasurer be restrained from paying out money from the treasury, but the real object is to compel him to retain in the treasury an amount equal to that which he has misapplied. This requires a refusal by the treasurer to pay the orders drawn upon him by the proper authorities pursuant to law. He is but the custodian of the public money. He has no discretion as to its use. It is held to be paid out and appropriated as the law directs.

The immediate question for our determination, therefore, is not whether the State should provide the means and require the treasurer to replace this fund, but whether it has so done. When the order to use the \$150,000 was made, the treasurer was authorized to replace it out of the first money which came into the treasury by way of dividends or taxes. When that of the \$200,000 was ordered, he was authorized to replace it from dividends and taxes for general purposes. The Revenue Act of 1871, however, expressly prohibited him from using for that purpose any money collected under its authority. The acts of 1873 and 1874 do not contain any such express prohibition, but they each direct that the taxes levied shall be applied to defray the expenses of the State government and to pay appropriations for charitable and penal institutions. This is the statement of the special object to which the tax is to be applied, required to be made in every law levying taxes, and the Constitution expressly prohibits its application to any other. While, therefore, the law does not prohibit the reimbursement of the special tax fund out of the money raised under its authority, the Constitution does. The expenses on account of which the money was taken from the fund, have already been paid with the money of the State. It is true the money paid ought not to have been so used, but it was none the less on that account the money of the State. The bondholders might, perhaps, if the money still remained in the treasury, compel its application to the payment of the interest on their bonds, but until so applied it did not become their property, and remains that of the State.

Syllabus.

It is not claimed that there is now any money in the treasury, except that which has been collected from taxes levied under the revenue laws of 1873 and 1874, and it is clear to our minds that there is no existing law which requires or even authorizes the treasurer to reimburse the special fund from that. The State may be under obligation to provide for such reimbursement, but the State and the treasurer occupy different positions. The State is the debtor, and is bound by its pledge of faith to provide means and pay its debts. The treasurer is but an agent of the State, bound only to pay its debts when required to do so by a valid law. If such a law exists, and he refuses to act, a proper court will by *mandamus* compel him to perform his duty. If he threatens to divert money appropriated for the payment of a debt, on proper application he may be restrained. But to authorize interference in either case, it must clearly appear that he wrongfully refuses to execute a valid law, which has been enacted by the legislative department for his guidance. The court cannot make laws for him. It can only compel him to execute such as have been made.

As there is therefore no money in the treasury which the treasurer is authorized or required by any existing law to appropriate for the reimbursement of the special tax fund, we cannot restrain him from paying out the funds in his hands until the reimbursement has been made. The principal in this case cannot be reached through the agent now before the court.

The bill is dismissed with costs.

United States Circuit Court, Eastern District of Virginia.

RICHARDS *et al.* v. THE CHESAPEAKE AND OHIO
RAILROAD COMPANY.

Secured creditors cannot dictate who shall be appointed a receiver. He is the hand of the court, and the interest of creditors of every grade will be considered in making the appointment.

Statement of the case.

A bill will be dismissed as to a subsequent mortgagee to the mortgagee in suit, he having been made a party to the litigation, and it being found that that hindered or defeated the suit.

Where trustees under a mortgage, of whom it is alleged in the bill for a foreclosure that they had refused to proceed to realize on the security, apply to come in and have been admitted as complainants in the bill, they must control the proceeding.

In equity.

The Chesapeake and Ohio Railroad Company, a consolidated company, the component parts of which were the Virginia Central Railroad Company, the Blue Ridge Railroad Company, and the Covington and Ohio Railroad Company, became insolvent.

There are secured and unsecured creditors of the road. The secured debts are:

A mortgage, dated April 1st, 1850, of the Virginia Central Railroad Company of all its property, to the Board of Public Works of Virginia for \$100,000, to secure the payment of certain bonds of the company which are due and unpaid. A mortgage, dated June 2d, 1854, to James Lyons, William H. McFarland, and Hugh W. Fry, of the same company, of all its property, to secure the payment of other bonds of the company, amounting to \$1,500,000, which are also due and unpaid. A mortgage, dated February 6th, 1866, of the same company, of all its property, to John B. Young and Robert R. Howison, to secure the bonds of the company for \$300,000, with interest at eight per cent. per annum, which remain unpaid. A mortgage, dated October 1st, 1868, of all the railroads which form the Chesapeake and Ohio Railroad Company, to William Butler Duncan, Philo C. Calhoun, William Orton, and Matthew F. Maury (now deceased), to secure certain liabilities, in amount unascertained, of the Virginia Central Railroad Company. A mortgage, dated January 15th, 1870, executed to William Butler Duncan and Philo C. Calhoun, the trustees complainant, by the Chesapeake and Ohio Railroad Company, for \$15,000,000, to secure the bonds now in suit. And a mortgage dated subsequently to January 15th, 1870, executed to Philo C. Calhoun and William K. Kitchen, of all the property mentioned in the last preceding mortgage, and embracing also that portion of the line of road extending

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from Richmond down to the peninsula of the York and James Rivers, and the branch railroad from Scary Creek in West Virginia, to the mouth of the Kanawha, and the bridge to be erected over the Ohio at Huntington.

BOND, J.—On the 4th day of October, 1875, the complainants filed their bill in this court, in behalf of themselves and all others in like interest, alleging that they were the holders of certain of the six per cent. coupon bonds issued by the defendant, to the extent of \$15,000,000, for the completion of their road from Richmond to the Ohio River. That the payment of these bonds, and the interest thereon accruing, was secured by what was claimed to be the first mortgage on said road, which mortgage was duly executed by defendant on the 15th day of January, 1870, and conveyed to William Butler Duncan and Philo C. Calhoun, citizens of New York, as trustees, all the franchises and property of said company then constructed, or thereafter to be constructed or acquired by the defendant.

The bill alleged that the company had made default in the payment of the interest on these bonds since the 1st day of November, 1873, and that complainants had required the trustees, Duncan and Calhoun, to foreclose the mortgage above referred to for the benefit of the bondholders named therein, with the proper offer of indemnity to them for expenses, and that they had failed and refused to institute proceedings therefor.

The bill concluded with an allegation of the total insolvency of the defendant, and with the ordinary prayer for an injunction and receiver, restraining the trustees and defendant corporation from disposing of the mortgaged premises without the order of this court, and for a sale and distribution of the proceeds among the bondholders, according to their respective priorities.

This bill, properly verified, being exhibited, the court ordered the motion for an injunction and receiver to be set for hearing on the 22d day of October following, provided a copy thereof, and of that order, was served on the defendant on or before the 7th day of October, 1875, and in the meantime, until the hearing of the motion, restrained the defendants from disposing of the mortgaged property, except in the ordinary way of the business

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of transportation of said company. Prior to the hearing of these motions, however, the complainants, by petition, brought to the knowledge of the court the fact that a large number of judgments had been obtained against the company, and that executions had been issued thereon, and that the sheriffs of the various counties through which the road passed had seized portions of the mortgaged property, and were about to seize and sell other portions, and they asked that to prevent immediate and irreparable injury to the mortgagees, a temporary receiver might be appointed, which was done accordingly, and Henry Tyson was so appointed.

Prior to the 22d day of October, the day set for the hearing of the motion for an injunction and permanent receiver, the defendant trustees (Duncan and Calhoun) filed a petition to the court, stating their surprise at the filing of the bill, alleging that no adequate demand to foreclose had been made upon them, and asked that they, being the proper persons to conduct the suit of foreclosure, might be allowed to become complainants and not defendants therein, which request, with the consent of all parties, was allowed.

The trustees then, with a large majority of their cestuis que trust and other creditors, together with the defendant company, asked the court in advance of the day fixed for the hearing of the motion therefor, to appoint Williams C. Wickham, the vice-president of the defendant company, receiver. All parties agreed that a receiver should be appointed.

The court, however, refused to take any action relating to the appointment until the 22d day of October, the day fixed and advertised for the hearing of that matter. On this last-named day the defendant company appeared, and filed an answer to the rule to show cause why an injunction should not be awarded and a permanent receiver appointed. The answer admitted the insolvency of the company, and asked again that Williams C. Wickham might be appointed permanent receiver. But the answer disclosed the fact to the court, not as yet stated in the proceedings, that the mortgage to Duncan and Calhoun, under which complainants claimed, and which in the bill is alleged to be a first mortgage, is not so in fact. This answer alleges it to be the

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fourth, while other exhibits now filed show it to be the fifth mortgage in point of time.

But the court, notwithstanding the almost unanimous consent of parties, refused to appoint Wickham, and it still adheres to the conclusions then formed.

It appeared to the court then, as it does now, that the Chesapeake and Ohio Railroad Company is overwhelmed with debt, secured and unsecured. How it became so it is not for us determine. But the court, when called upon to appoint a receiver for a corporation totally insolvent, who is to be the mere servant of the court, upon whose fidelity and ability to manage during the pendency of the suit the property intrusted to him, the court must rely, ought not, and ought not to be expected, to appoint a person under whose charge and control the resources of the road had been exhausted, its property seized upon execution, and the necessity for a receiver brought about.

The receiver is not the receiver of the bondholders or secured creditors. He is the mere hand of the court. The unsecured creditors, whose chances of a dividend are remote, have a deep interest in knowing that the road, while its assets are being marshalled, and its creditors, their claims and priorities ascertained, is free from the control of those whose administration of its affairs ended in bankruptcy.

Upon the refusal of the court to remove its receiver, Duncan and Calhoun, trustees under the so-called first mortgage, who had, as before stated, by general consent become complainants, filed their amended bill. In this bill it is set out that the Chesapeake and Ohio Railroad Company is what is known as a consolidated company. Its component parts were the Virginia Central Railroad Company, the Blue Ridge Railroad Company, and the Covington and Ohio Railroad Company. The bill further states that on the 1st day of April, 1850, the Virginia Central Railroad Company executed a mortgage to the Board of Public Works of Virginia of all the property of said company to secure the payment of certain bonds, amounting to one hundred thousand dollars, which are due and unpaid.

And that the same company, on the 2d of June, 1854, executed to James Lyons, William H. McFarland, and Hugh W. Fry,

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another mortgage of all its property to secure the payment of other bonds of said company, amounting in all to one million five hundred thousand dollars (\$1,500,000), which are also due and unpaid.

And that, on the 6th day of February, 1866, the same company executed another mortgage to John B. Young and Robt. R. Howison of all its property, to secure the bonds of the company, amounting to three hundred thousand dollars, with interest thereon at the rate of eight per cent. per annum, which remain unpaid. And the bill further states that a fourth mortgage was executed by the Chesapeake and Ohio Railroad Company on the 1st day of October, 1868, to William Butler Duncan, Philo C. Calhoun, William Orton, and Matthew F. Maury (now deceased), of all the railroads which had gone to form the said Chesapeake and Ohio Railroad Company, from its terminus in Richmond to the Ohio River, together with all its franchises and property, to secure certain liabilities, in amount unascertained, of the Virginia Central Railroad Company. And that afterwards, on the 15th day of January, 1870, was executed the mortgage to these two trustees, complainant, by the defendant company, being the fifth in point of priority of time, to secure the payment of the \$15,000,000 bonds now in suit. And that subsequently to this the said defendant executed another mortgage to Philo C. Calhoun and William K. Kitchen of all the property mentioned in the last preceding mortgage, and embracing also all that portion of the line of the road extending from Richmond down to the peninsula of the York and James Rivers, and the branch railroad from Scary Creek, in West Virginia, to the mouth of the Kanawha, and the bridge to be erected over the Ohio at Huntington. Orton, a co-mortgagee in the fourth mortgage with these complainant trustees, is a citizen of New York, and, so far as this suit is concerned, has an interest adverse to them. And Kitchen, who is a co-mortgagee with the complainant Calhoun in the mortgage of the 1st October, 1872, is likewise a citizen of New York, and being a subsequent mortgagee, holds an interest adverse to his co-trustee, Calhoun, in this suit.

Under these circumstances, the Chesapeake and Ohio Railroad Company, the defendant company, moves to dismiss the suit for

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want of jurisdiction, because Kitchen and Orton, who are parties defendant to the bill, are citizens of the same State with the complainants.

So far as this motion is concerned, if it were resisted on the part of the trustees, we should have little difficulty in disposing of it. Kitchen, though a proper, is not an indispensable, party to the suit, and if it appeared to the court that it would be advantageous to the interest of the bondholders in this suit to proceed without him, he being a subsequent mortgagee, the court might, by the exercise of the ordinary powers of courts of equity having control of suitors, dismiss the bill as to him, and proceed, and if the trustees who are here complainant, thought it best for the interest of their cestuis que trust to sell their mortgage debt, they might ask the court to strike out Orton's name also, and proceed to dispose of their bare interest in the road as mortgagees.

So soon, however, as the trustees in this suit were allowed by the complainant bondholders, who first invoked the aid of the court, to become complainants here, they became charged with the conduct of the cause. The only standing the original complainants had in court arose from the allegation in their bill that the trustees in their mortgage were derelict. When the trustees came into court, denied the charge of unfaithfulness, and asked to do what the complainants alleged they ought to do, but were unwilling to do, and the complainants consented that they should become complainants instead of defendants, in order that they might proceed, they became masters of the suit.

And now come these trustees also, and ask the court that the bill may be dismissed, and that they may be allowed to proceed in the courts of the State in which they have already commenced proceedings, where, as they allege, certain difficulties in regard to jurisdiction which arise here will not be in the way of their proceedings. They allege that whether the court has jurisdiction or not, as the defendants say it has not, to sell the interest they hold in the railroad by virtue of their mortgage, it would be very unwise to do so. That in their judgment all the prior as well as subsequent incumbrances should be made parties to the proceedings in order to realize the full value of the mortgaged premises. But they allege this cannot be done in this court,

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because Orton, who is trustee under the fourth mortgage, is a citizen of New York with them, and because Kitchen, trustee under a subsequent mortgage, is likewise a citizen of New York. And they file here the record of their proceedings to foreclose in the State court, and ask that they may be allowed to proceed in that forum and not in this.

And all the bondholders under complainants' mortgage either agree with them or acquiesce in their request, with the exception of a few who hold bonds to the amount of about \$200,000.

Under these circumstances, for the court to determine that the trustees shall proceed here and not elsewhere, there being no charge of duplicity or fraud on their part, would be to set up the opinion of the court as to what the best interests of these cestuis que trust are against those of themselves and of the trustees who are legally charged with the care of those interests.

But we think it is plain, from the papers exhibited here, that it would not be proper to proceed in this cause without making some, at least, of the prior and subsequent mortgagees parties.

The mortgage to Duncan, Calhoun, and Orton, of the 1st of October, 1868, to secure \$10,000,000, is still outstanding, and embraces all the property of the Chesapeake and Ohio Railroad, but what is the actual indebtedness thereunder is not known, and cannot be ascertained except by a legal proceeding.

How could a purchaser at a sale decreed by us foreclosing this mortgage ascertain before bidding what the value of the property to be sold was when there might be an incumbrance on it of \$10,000,000, or, as is claimed, of not more than \$10,000? Would it be for the interest of these complainants to sell unless they had first put themselves in position to inform purchasers what was the actual amount of prior incumbrances on the railroad? This cannot be done without making Orton a party to the suit, and the objection to that here is that he is a citizen of the same State with the complainants. It is urged, however, that Calhoun and Duncan are co-trustees with Orton, and that the court having them already before it need not require the third trustee to be a party. But these co-trustees object to represent both classes of cestuis que trust because their interests are adverse, and urge that Orton is the only trustee who is charged

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solely with the interests of those claiming under the ten million mortgage.

It would not be proper for the court to deprive those mortgagees of their sole, peculiar, personal representative.

But the complainants claim that it is necessary also to make Kitchen, who is trustee under a subsequent mortgage, a party, for the reason that while that mortgage is subsequent to that of complainants, on the part of the Chesapeake and Ohio Railroad, extending from Richmond to the Ohio River, it is claimed to be a first mortgage on the part of that road extending from Richmond towards tide-water.

The trustees assert that while in their judgment, under the statutes of Virginia, their mortgage covers this part of the property of the defendant company, also, before any sale it is necessary that these conflicting claims of priority of lien should be settled. They state that in their judgment it would not be for the best interests of their mortgagees to sell a portion of the road only, but to sell it as an entirety it is necessary that Kitchen should be a party to this suit, which cannot be because he likewise is a citizen of New York.

But the bondholders, who object to the dismissal of the bill ask leave, if the court allow the motion to dismiss, to file a new bill in this case, making the proper parties, and relating back to the time of filing the present bill.

A fatal objection to this request is that now that the trustees have undertaken by legal means to foreclose this mortgage, no bondholder has a right to proceed in his own name to foreclose. He can ask the aid of a court of equity only on the ground of unfaithfulness, neglect, or inability on the part of the trustees. Upon due consideration, therefore, the court will make an order directing the receiver to settle his accounts up to a day named therein, and to make a report thereof to the court up to that date, whereupon he will be discharged, and the complainants be allowed to dismiss these proceedings and prosecute those already commenced in the State court.

I fully concur in the foregoing opinion.

M. R. WAITE.

Statement of the case.

United States Circuit Court, Eastern District of Virginia, at Richmond, June 6th, 1876.

THE NATIONAL BANK OF FREDERICKSBURG v. WALTER P. CONWAY AND OTHERS.*

A notary public is competent to acknowledge and certify a deed of trust, although he is interested as one of the beneficiaries in the trust.
 If a deed of trust is actually delivered to the trustee, with power to record it when he deems proper, it is valid as against the assignee in bankruptcy, although it is not recorded until after the grantor's failure.

IN equity.

On the 20th of July, 1875, the defendants were, and for many years before had been, partners in business as bankers and stock and note brokers at Fredericksburg. M. Slaughter & Son, a firm composed of Montgomery Slaughter, the father, and William L. Slaughter, the son, were extensive millers at the same place, and the defendants were accustomed to discount and negotiate their commercial paper, as occasion required in the course of their business. The rule of the defendants was to require satisfactory indorsers upon paper discounted by or through them, but upon the representation of M. Slaughter, with whom all transactions for his firm were had, that he did not indorse for others, and on that account could not ask others to indorse for him, it was agreed that a deed of trust from him, conveying the property now in controversy, would be accepted as security for the paper of his firm offered for discount or negotiation in lieu of an indorser. Under this arrangement it was his custom when offering paper to the defendants, to accompany it with a deed of trust, conveying this property to the defendant, William P. Conway, as security for the benefit of the holder in case it should be discounted. The deed was always delivered to the trustee, and retained by him until the payment of the paper, when it was surrendered or cancelled. No reconveyances were ever executed,

* The two decisions in this case are also reported in 14 N. B. R. R., 175 and 518.

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and prior to the one now under consideration, none of the deeds so executed were recorded, but the trustee had full power to have this done whenever he or the holder of the paper deemed it necessary.

After this arrangement was made, no indorsed paper of Slaughter & Son was ever discounted by the defendants, as a firm, for their own account or for others, without such a deed. The transactions of the kind, which were numerous, were not unnecessarily published, neither were they concealed. The character of the security was always explained to those interested in the paper, or negotiating for its purchase.

The property conveyed belonged to M. Slaughter individually. The firm had no interest in it.

On the 20th of July, 1875, the defendants held three notes made by M. Slaughter & Son, payable to their own order, and by them indorsed as follows:

One for one thousand dollars, dated March 22d, 1875, payable six months after date. One for the same amount, dated May 22d, 1875, and also payable six months after date. And the other for fifteen hundred dollars, dated July 14th, 1875, and payable ninety days after date.

It is admitted that all these notes were secured by deeds of trust in the usual form, but which were never recorded.

Slaughter & Son, desiring a further accommodation of two thousand dollars, made their note for that amount in the usual form, dated July 20th, and payable December 20th-23d, 1875, and offered it to the defendants for discount or negotiation.

At the same time M. Slaughter executed to the defendant, Conway, the deed in question to secure this note of two thousand dollars, as well as the other three notes then held by the defendant. The deed was acknowledged before the defendant, Garnett, a notary public, and delivered to Conway. The note was delivered to the defendants, by whom it was discounted and the proceeds placed subject to the check of M. Slaughter & Son on the 21st of July.

The note falling due September 22d-25th was paid at maturity; but on the 15th of October, when that for fifteen hundred dollars fell due, Slaughter & Son informed the defendants that they

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would not be able to meet it, and that they found themselves compelled to suspend payment generally. Conway, immediately upon receiving this information, placed his deed of July 20th on record. Until this time the solvency of the firm had never been doubted. Their suspension was a matter of surprise to all.

Within a short time after their suspension, Slaughter & Son were adjudged bankrupts upon the petition of the National Bank of Fredericksburg and other creditors. The debt due to the bank was evidenced by two notes of twenty-five hundred dollars each, made by M. Slaughter, and indorsed by W. L. Slaughter and M. Slaughter & Son.

After the adjudication of the bankruptcy, Conway advertised the trust property for sale under the powers of the trust on the 22d of November. On the 11th of November, before the appointment of an assignee, the bank filed this bill, in behalf of itself and the other creditors, to enjoin the sale as advertised, and to have the deed adjudged invalid as against the assignee when appointed, and those whom he represented. Other creditors afterwards made themselves parties to the suit, as did the assignee when appointed.

The District Court decreed in favor of the complainants in accordance with the prayer of the bill.

The judge of that court had rendered the following decision in explanation of the grounds of his decree:

HUGHES, J.—There is no question here of actual fraud or of moral wrong-doing. The transaction of the 20th of July, 1875, was between men of the highest character, socially and in their pecuniary dealings. There is but one question in the case, which is, whether the writing, signed and acknowledged on the 20th of July, 1875, kept in the iron safe of Conway, Gordon & Garnett until the paper of Slaughter & Son had gone to protest on the 15th of October, 1875, and on the afternoon of that day recorded, is valid under Section 5128 of the Revised Statutes of the United States.

This statute is not a statute of frauds, but of disabilities. It establishes a policy. It makes it against the policy of the law for men, knowing the insolvency of their debtors, to exact or

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take deeds of preference from them. State laws permit this, and indeed encourage it. But Congress declares a different policy, and places failing debtors in the same condition as to deeds, grants, and conveyances of preference, in which State laws place minors and *femes covert* as to contracts, and in which State laws place all adults who are in debt, but *sui juris*, as to deeds of gift. The word "fraud" occurs but once in this Section 5128, and then not as implying moral or actual fraud, but only as implying a breach of the policy of the law just mentioned; the phrase in which the word occurs being "in fraud of the provisions of this act."

I have nothing to do, therefore, with fraud as a crime, moral or legal. I have only to inquire whether the writing between M. Slaughter and Walter P. Conway, trustee, signed and acknowledged on the 20th of July, 1875, was in violation of the policy of Section 5128 of the Revised Statutes, and therefore void.

The question whether this writing was properly *acknowledged* or not, which was so ably and elaborately argued at bar, is only a secondary one in the case. The primary question is, when did this writing become a deed as between the grantor and grantee? The acknowledgment of the writing by the grantor had reference only to its being recorded, and thereby made valid as against his creditors. If the question were only as to acknowledgment, I should decide, without hesitation, that it was properly acknowledged; for the teaching of the cases cited at bar seems to me plainly to be, that an interested person may take the acknowledgment of a deed when the act is merely ministerial; though if the act be judicial, such as taking the acknowledgment, after privy examination, of a married woman, an interested person cannot take it. *Harkins v. Forsyth*, 11 Leigh, 294; *Carper v. McDowell*, 5 Gratt., 212; *Horsley v. Garth*, 2 Gratt., 471; *Taliaferro v. Pryor*, 12 Gratt., 277; *Johnston v. Slater*, 11 Gratt., 321; *Turner v. Stip*, 1 Wash., 319; *Hampton v. Stevens*, 10 Am. Law Register, 107 (1871); *Boswell v. Flockheart*, 8 Leigh, 364; *Dimes v. Grand Junction Canal Company*, 16 Law Equity, 63.

Though the acknowledgment of this writing of the 20th of July, 1875, were good, that fact might not invalidate the deed;

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for it has been recently decided, by the Supreme Court of the United States, in *Sawyer and others v. Turpin and others*, 1 Otto, 114, that the recording of a deed may be within the period of prohibition imposed by the Bankrupt Law, and yet the deed itself be good against an assignee in bankruptcy, if executed before the period. Were it necessary, I should hold that that decision does not govern this case. A clear distinction may be drawn between this case (relating to real estate) and that decided in *Sawyer v. Turpin* (relating to personalty), founded on the distinction between the respective laws of Massachusetts and Virginia relating to fraudulent conveyances. The law of Massachusetts, on which the decision in *Sawyer v. Turpin* was rendered, declares that mortgages of personal property *shall not be valid* against any other person than the parties thereto, *unless*, etc., etc., the mortgage be recorded, etc. Whereas, the law of Virginia declares that every deed of trust, conveying real estate or goods and chattels, *shall be void* as to creditors, *until and except* from the time it is duly recorded. The deed of Montgomery Slaughter, signed and acknowledged the 20th of July, 1875, was void as to creditors, and was not a deed at all, until the 15th of October, 1875; and I doubt if the Supreme Court of the United States would hold that it took effect any earlier as to the assignee in bankruptcy representing the general creditors of the bankrupt.

But, assuming that the decision in *Sawyer v. Turpin* governs this case, as to deeds which have become deeds between the parties to them, previously to the period of two months before bankruptcy, but recorded within that time, the further question is, when did this writing of the 20th of July, 1875, become a deed, good as between M. Slaughter and W. P. Conway, the parties to it?

It cannot be claimed that this writing was, in the hands of W. P. Conway, until the 15th of October, 1875, an *escrow*; for, in strict law, an *escrow* is a deed delivered to a stranger, which is to become valid on the happening of some definite future contingency. From this writing having been delivered to the grantee by the grantor, and not to a stranger, it cannot be called, with technical accuracy, an *escrow*.

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But was it in truth and in law a deed, so delivered and so accepted, until the day it was recorded in the office of the corporation of Fredericksburg? This I assume, of course, to depend upon the understanding or contract as to it, which was had between M. Slaughter and W. P. Conway, either tacitly or expressly, on the day it was signed.

The transaction of the 20th of July, 1875, is stated by Conway, Gordon & Garnett, in their answer, to have been "precisely similar" to numerous others that had preceded it for five or six years. These writings had never been treated as passing title, but as papers which might be treated as nullities after awhile and cancelled. No previous one of these writings had been recorded; no previous one had been treated as a deed of conveyance requiring release. All had been treated as writings that might become deeds in the option of the trustee, or of the holders of the notes of M. Slaughter & Son. All of them had been held privately by W. P. Conway, and by him torn up and cancelled whenever he so elected to do.

Now, the very question in this case is, whether the writing of the 20th of July, 1875, signed and acknowledged by M. Slaughter, and delivered by him to W. P. Conway, with the understanding that it was to be cancelled on the payment of the notes which it secured, was intrusted to him in a way that made it a nullity from the beginning, except in case of default; was intrusted to him in a way to pass no title and requiring no release except on default. I say the very question is, whether such writing was a deed, to be taken and treated, as a deed as of the 20th of July, 1875. Was it a deed at all until the 15th of October, 1875, when W. P. Conway elected to treat it as such?

I see no reason and know of no precedent which requires a paper, in form a deed, but delivered upon condition that it is not to be treated as a deed passing title, except on the future election of the holder of it, to be held in law as an absolute deed from its date, contrary to the intention of both grantor and grantee in making it.

In the case before me, the intention of both grantor and grantee was, that the deed was not only not to go upon record, to bind creditors, but was not to be a deed passing title, in such a

White, C. J., dissenting.

way as to require a release of title, until the grantee should elect so to treat it. I do not think that a paper in form of a deed, which both parties to it agree is not to be treated as a deed except upon a future contingency, can become a deed until the happening of that contingency. I therefore hold that the paper which was signed and acknowledged by Slaughter, and accepted by Conway on the 20th of July, 1875, did not become a deed until Conway, on the 15th of October, elected to treat it as such, and put it upon record. Section 5128 makes void any conveyance which, directly or indirectly, absolutely or conditionally, creates a preference of one creditor over others within two months before the filing of the petition. As the deed in question was void by law as to creditors until the 15th of October, 1875, and, as between parties, was a private, inchoate, defeasible writing until that date, I think that it did not take the character of a deed of conveyance or pass any title until that date; and, therefore, that it falls within the inhibition of Section 5128 of the Revised Statutes.

I so decide; and will sign a decree in accordance with the prayer of the bill, declaring the deed of Slaughter to Conway void, and setting it aside.

From that decree an appeal was taken, on the hearing of which the Chief Justice decided as follows:

WAITE, C. J.—The Supreme Court of the United States decided at its last term, in *Sawyer v. Turpin*, not yet reported, that if a mortgage to secure a pre-existing debt was executed more than four months before the filing of a petition for the adjudication of the mortgagor a bankrupt, it would be good as against the assignee in bankruptcy when appointed, if recorded before his rights attached but within the four months. This case arose before the act of June 22d, 1874 (18 Stat., Pt. 3, 180), changing the time of the prohibited preference to a period within two months next preceding the filing of the petition, instead of four, as it originally stood. Upon the principle established in that case, this deed of trust is not invalid under the provision of Section 35 of the Bankrupt Act as amended and enforced at the time of its execution.

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The deed was delivered to Conway when it was executed, and held by him as security for the notes it described. The testimony is clear upon this point. The failure to record previous deeds of the same character, their surrender for cancellation without a formal reconveyance after payment of the notes, and their acknowledgment before the defendant Garnett as a notary, are all circumstances proper for consideration when determining what the real character of this transaction was; but, in our opinion, they are not sufficient to overcome the positive testimony of all the parties to the effect that the delivery was complete, that the object on both sides was to secure the debts provided for, and that Conway, the trustee, was fully authorized to cause the record to be made whenever he or his beneficiaries thought it desirable to do so.

The deed was good as between the parties without record, but until recorded it was void against creditors. (Code of Virginia, 1873, page 897, Chapter 114.) No deed can be admitted to record until proved or acknowledged in the manner provided for. (Same Code, 905, Section 117.) A record without the requisite proof or acknowledgment does not affect creditors.

A deed may be acknowledged by the grantor before a notary public, and, upon the certificate of the notary to that effect in proper form, recorded. The form of the certificate in this case is correct, but it is insisted that because Garnett, the notary, was interested as one of the beneficiaries in the trust, he was incompetent in law to receive and certify the acknowledgment. This presents the principal question in the case for our consideration.

The law provides only for the acknowledgment of a deed before a notary public. It does not require, in express terms certainly, that he shall be disinterested. A notary public is an officer provided for by statute. He must give bond for the faithful performance of his duties. (Code of Virginia, 1873, page 903, Chapter 116.)

It has been frequently decided that an acknowledgment before a grantee named in a deed was of no effect. *Beaman v. Whitney*, 29 Maine, 413; *Wilson v. Trear*, 20 Iowa, 233; *Stevens v. Hampton*, 46 Missouri, 404; *Groesback v. Seely*, 13 Michigan, 345. It has also been held that a party interested in a deed can-

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not take and certify the acknowledgment of a married woman requiring a privy examination. *Withers v. Baird*, 7 Watts, 228. The taking of such an acknowledgment is, in some respects, a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment it is purely a ministerial act. *Freeman v. Love*, 14 Ohio St., 531; *Lynch v. Livingston*, 2 Seld., 434. Upon this principle it was decided in *Dussucme v. Burnett*, 5 Iowa, 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in *Stevens v. Hampton*, before cited.

In October last the judge of the Rockbridge Circuit Court of Virginia held, in the case of *Lady v. Lady*, pending before him, that a grantee named in a deed, though a trustee only, was incompetent to take the acknowledgment of a married woman, the grantor, which required a privy examination. An acknowledgment of that kind, it was said, was of such sanctity as to make it necessary for the officer taking it to be disinterested.

The recording acts are intended for the security of titles and the prevention of frauds. They are to be construed liberally to that end. As the record, when made, is constructive notice to all having the legal right to rely upon it for protection, public policy requires that it shall import as near absolute verity as is consistent with a due regard to the rights of the parties interested. A deed acknowledged before one named as grantee, carries upon its face notice of that fact, or, what is equivalent, notice of circumstances sufficient to put a reasonable man upon inquiry. But when the name of the officer taking the acknowledgment does not appear as grantee, or as otherwise interested, no such notice or presumption accompanies the deed or its record.

A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He has full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them.

The question we have now before us is not whether as between these parties the certificate can be impeached, but whether it is sufficient in law to authorize the record. It states only facts.

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The deed was actually acknowledged before a notary public. A recorder receiving it in its present form, and not knowing that the certifying officer was interested in the conveyance, would certainly be justified in putting it on record. The deed itself did not carry notice to him of the supposed disqualification any more than it did to others. It was no part of his duty to detect the secret interest of the certifying officer. If the instrument was apparently sufficient in form, he had nothing to do but to receive and record it. All this the grantor knew, or ought to have known.

Every man is held responsible for the necessary consequences of his own voluntary acts. This is a familiar rule, and as old as the principles of common honesty. A grantor acknowledges a deed for the purpose of putting it in a condition for record. The object of the record is to give public notice of what had been done with the property. The public are expected to examine and act upon this evidence. Having voluntarily acknowledged and delivered his deed, the grantor is presumed to have voluntarily consented to its record. He must, therefore, be charged with all the legitimate consequences of such an act. If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principles of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title. But this defence would be open to him if his acknowledgment were actually void. Void acts are as no acts; they bind no one. Voidable acts are good until avoided, and they cannot be avoided as against rights actually vested under them.

As against the grantee, a deed is as much voidable after record as before. So far as he is concerned, the effect of the record is only to change the burden of proof, to some extent, from him to the grantor. After a record duly made, the law presumes that all has been done which is necessary, to give the instrument validity, but this presumption may always be rebutted as against the grantee. And as against third parties, it may be shown that a deed was never signed, sealed, or delivered.

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Clearly, therefore, it is against the policy of the recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effort should be to prevent rather than allow hidden defects in the evidence of public records. If voidable only, it is sufficient to authorize the record, if not previously avoided. So, too, as has been seen, it may be avoided at any time after record and before the rights of third parties have attached. This, as it seems to us, furnishes the grantor with all the protection he has the right to demand as against the consequences of his own acts, and at the same time leaves to the recording acts their legitimate power and effect. We conclude, therefore, that the acknowledgment in this case before Garnett was sufficient to authorize the record of the deed to Conway.

The acknowledgment may, however, as between these parties, be avoided for fraud if established. But there is no proof of fraud. On the contrary, all parties agree that the acknowledgment was freely and fairly made in the belief that it was in all respects sufficient to vest the title in the trustee for the purposes specified.

The decree of the District Court annulling the deed is therefore reversed; but inasmuch as the trustee named in the deed is interested in the debt secured by the trust, the sale advertised by him should be enjoined, and another trustee appointed to execute the trust in that behalf. A decree may be prepared in accordance with this opinion.

Circuit and District Courts of the United States, Eastern District of Virginia, at Richmond.

ALDERDICE, ASSIGNEE, v. THE STATE BANK OF VIRGINIA
AND D. C. MAYO, BANKRUPT.*

Where a tobacco manufacturer, who has been overchecking to a large amount for several months on a bank, by collusion with a defaulting

* The decision of the District Court in this case is also reported in 11 N. B. R. R., 898.

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teller; and who, on his transactions being discovered, fails to pay up his default, but executes a deed of preference to secure to the bank the amount overdrawn, within a month of involuntary proceedings in bankruptcy against him in which the adjudication goes by default;

Held, that although the general business transactions and condition of the bankrupt, at the time of making the deed of preference (disconnected from the especial transactions with the bank covered by the deed), may not have been sufficient to constitute reasonable cause to believe that he was insolvent and made the deed to defeat the provisions of the Bankrupt Law; yet, that these especial facts out of which the deed arose, were sufficient to remove all doubt and to constitute reasonable cause of belief in the mind of the president of the preferred bank.

Held also, that bankrupt courts, in considering transactions impeached under the 35th section of the Bankruptcy Act, look primarily to the *policy of the law* forbidding dealings with failing debtors; and, if such transactions fall within the conditions specified by the section, will annul them even though positive *frauds* be not proved upon the beneficiaries of them.

In equity.

This bill is brought on the chancery side of this court to set aside a deed of preference, made by said bankrupt to said bank within four months of bankruptcy, as void under the 35th section of the Bankrupt Act.

W. W. Crump and H. A. & J. S. Wise for the complainant, and John H. Guy and Ould and Carrington for defendants.

The facts of the case are sufficiently stated in the opinion of the district judge, which is as follows:

HUGHES, J.—W. C. Mayo filed his petition against David C. Mayo, tobacco manufacturer, of the city of Richmond, on the 27th of November, 1872, containing the usual allegations, and praying that David C. Mayo might be adjudicated a bankrupt.

No defence was made, and the adjudication went by default on the 7th day of December, 1872. The property surrendered by the bankrupt was a certain lot of ground in Richmond, on which was his tobacco factory, and the fixtures used in the same, and certain personalty and *choses* in action.

The leading facts bearing upon the question of solvency are as follows:

The assignee has sold the real estate for \$20,200; and the fixtures in the factory for \$14,700. He has also realized from all

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the other assets surrendered the aggregate sum of \$5632.30. From the whole assets of every name, surrendered as of the 7th of December, 1872, there has been realized the total sum of \$40,532.30.

The bankrupt's schedules of debts show three debts secured by deed of trust, as follows, to wit: a debt due Douglass H. Gordon for purchase-money of the lot, \$7357.50; a debt due Charles E. Whitlock for a loan of \$10,000, at 12 per cent. interest, made in October, 1872; and a debt due to the State Bank of Virginia of \$8280.66. These debts amount in the aggregate to \$27,318.42. The schedules show other debts amounting to \$40,836.28. Of this \$40,836.28, all was contracted in 1872, except \$6000, which grew out of a partnership account, with a partner since deceased, in 1868, of which \$1000 was due in January, 1872, and the residue in 1878, 1879, 1880, 1881, and 1882.

The debts are generally an open account; the exact dates at which they were contracted do not reliably appear, except, as already said, that they were contracted in 1872.

The number of creditors in the schedules who have proved their debts is over 50, besides a large number of employes.

At the time of the proceedings taken in bankruptcy Mayo had discounts to the amount of \$56,880.50. These were obtained on about 44 pieces of paper, on which others than himself were primarily bound, which were drawn on consignees of his tobacco, and which were discounted for him at various dates, from October 5th, 1872, to November 20th, 1872. The discounts had been given him mostly by the Richmond Banking and Insurance Company; the residue by several other lenders. Of these \$56,880.50 of discounts, the sum of \$35,097.77 was obtained after the 28th of October, 1872. Thus it would seem that the question of solvency was doubtful at any period as much as a month before the commencement of proceedings in bankruptcy.

One month before the commencement of those proceedings, namely, the 28th of October, 1872, the bankrupt made the deed of trust already mentioned, to secure the debt of \$8280.66, due the State Bank of Virginia; conveying for that purpose his

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remaining interest in the factory lot, building, and fixtures, which were already incumbered by the two other deeds of trust from himself and wife; the first securing \$7357.50 due to Gordon for unpaid purchase-money, and the other securing \$10,000 of money loaned by Whitlock.

The present bill in chancery is brought to impeach the validity of this third deed of trust, made in favor of the State Bank of Virginia, and to set it aside as void under the first clause of the 35th section of the General Bankruptcy Act.

This deed was made on the 28th day of October, 1872, to secure a sum of money, all or most of which was found, on or about that day, to be due the bank from Mayo for money of the bank, which had been fraudulently obtained on overchecks, and used by Mayo for several months preceding, by collusion with its teller, and which, on detection, it would seem that Mayo could not pay.

I will assume that, but for the peculiar circumstances in which it originated, there would not be sufficient reason, to be found in the other transactions of Mayo, for invalidating the deed of the 28th of October, 1872. I will assume that although the bankrupt was in fact insolvent, and must have known his insolvency on the date of the deed, yet there was not, except in the circumstances out of which the deed grew, reasonable cause existing to bring a knowledge or belief of the insolvency home to the mind of the president of the State Bank, Mr. John L. Bacon. I will concede, what the high character of Mr. Bacon forbids me to question, that *his* action (which was that of the bank) in requiring and accepting the deed of preference from D. C. Mayo, was in fact honest, *bona fide*, free from all taint of moral fraud. I will concede, what was strenuously insisted by counsel for the bank, that courts of equity look primarily to the good faith of transactions, and are slow to set aside contracts made with honest intent and purpose.

The validity of the present deed depends upon the meaning and intent of the first clause of the 35th section of the General Bankruptcy Act. The object of that section is to invalidate

any deed of conveyance by which a debtor makes over property to a creditor, for the purpose of securing a pre-existing debt, in preference to other pre-existing debts, within the period of four months preceding the commencement of proceedings in bankruptcy, the debtor being insolvent or contemplating insolvency, and making the deed for the purpose of preventing that *pro rata* distribution of his effects which is contemplated by the Bankruptcy Act, under circumstances which constitute reasonable cause for the creditor to believe that he was insolvent or contemplated insolvency, and made the deed with such intent.

There are many contracts which the law treats as void, however honest may be the intent with which they are made. It does so for sound reasons of public policy. Among such contracts are the five classes declared void by the statute 29 Charles II, ch. 3, which has been adopted in all the States of the Union, commonly called the Statute of Frauds. They are called fraudulent contracts, not because they are so in morals, *mala in se*, but because they were the source of frauds. The object of the statute was to prevent the many abuses which arose from the former legality of those contracts, and it was called the Statute of Frauds because it was rendered necessary by those abuses, and was enacted to prevent them. I mention this statute only for the purpose of illustration. So, contracts of infants and of married women are held to be invalid by the law, not because many of them may not be strictly honest and even commendable, but because it is against the policy of the law to uphold them.

In like manner, such contracts as are declared void by the 35th section of the General Bankrupt Act, are so treated, not because they may not, as in the instance under consideration, be free from moral fraud on the part of the preferred creditor, but because it is against the policy of the law to allow preferences to be made of one creditor over others, by debtors, within four months of bankruptcy.

As it is the policy of the general law to forbid the making of contracts with minors and women under coverture, so it is the policy of the bankruptcy law to forbid interested persons from securing preferences or transfers of property from failing debtors. As it is the policy of the general law to ignore contracts of cer-

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tain kinds not reduced to writing, so it is the policy of the bankruptcy law to set aside certain contracts with failing debtors made within certain periods of their bankruptcy. In construing these latter contracts, the bankruptcy court is not bound to search for badges of positive fraud, as the ground for setting them aside, but must look primarily to that just policy of the law which is intended to secure the equal right of all creditors against arrangements by debtors for the exclusive advantage of a few.

In *Buchanan v. Smith*, 16 Wallace, 301, the Supreme Court of the United States say, what the language of the law shows, that an "equal distribution of the property of the bankrupt, *pro rata*, is the main purpose which the Bankrupt Act seeks to accomplish," and it is in order to secure this purpose that the 35th section, rendering void certain deeds of preference, was made a part of it. But for the fact that the laws of nearly all the States permit, if they do not encourage, deeds of preference to be made by failing debtors, it is not probable that any national bankruptcy law would remain upon the statute-book a moment longer than should be necessary to subserve the immediate financial exigency in which each law usually originates. This 35th section of the present act having made a deed of preference, if executed and accepted under certain circumstances, *void*, it is not sufficient, as counsel for the defence insisted, for me to look into the *bona fides* of Mr. Bacon in deciding upon its validity.

That section makes no use of the term *fraud*, except in a collateral expression, which refers merely to a contravention of the Bankruptcy Act, and refrains from treating a deed of preference as an act of moral delinquency.

The bankruptcy law takes the estate of the bankrupt into custody of its court, and transfers it to the assignee, subject to such liens by way of preference as existed more than four months (now two months) before the petition in bankruptcy, and subject to such transfers, other than those for securing pre-existing debts, as were made more than six months (now three months) before the petition.

But it says to creditors and transferees, "You shall not take

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assignments from failing debtors *within the respective periods of four and six months*, in any case in which you have reasonable cause to believe that they were insolvent at the time of the assignment; you shall not do so, because such transactions contravene my policy of a *pro rata* distribution, which is a policy of justice." It so declares without any reference to the element of bad or good faith, except as the former may be necessarily involved in the acceptance of such assignments.

Formerly, the bankruptcy law of England did not respect liens even older than four or six months, unaccompanied by actual transfers of title. It gave no more dignity to a judgment or a bond under seal than to a note or open account. It treated all these forms of indebtedness as of equal dignity, and distributed the assets in bankruptcy *pro rata* among these classes of claims. It was enacted in the spirit of the law merchant which treated debt as debt, and it did not give to a bond under seal or to the judgment of a court of record the sanctity of the Apostle's Creed, according to the old county court lawyer's idea.

In this country the influence of the artificial distinctions and arbitrary priorities established by the old common law has dominated in our legislation, and our general bankruptcy law has been interpolated with provisions inspired by the reverence with which the old county courts of the rural districts regard the judgment lien.

But this law, while respecting liens acquired beyond the period of four and six months before the bankruptcy, yet for sound reasons of justice and policy will set aside, under certain circumstances, assignments made within those periods, without special reference to the good or bad faith of the parties to them.

I am not bound, therefore, to consider this deed with any reference to the moral good faith with which it was accepted by Mr. Bacon.

I am to consider, simply, whether it falls within the description of the first clause of the 35th section of the Bankruptcy Act. If it does, it is void; if it does not, it is valid.

To be void under that clause, the deed must be liable to all the following objections:

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1. It must have been made within four months of the commencement of proceedings in bankruptcy.

2. It must be a deed of preference, securing and intending to secure a pre-existing debt over other pre-existing debts.

3. The grantor must have been insolvent at the time of making the deed, or have contemplated insolvency.

4. The beneficiary must have had "reasonable cause to believe" at the time of the deed, that the grantor was insolvent, and made the deed to prevent a *pro rata* distribution of his effects.

It is useless to enter into any inquiry whether this was, and was intended to be, a deed of preference. The fact is patent, and cannot be denied. The deed was also made, not only within four months, but within one month of the commencement of proceedings in bankruptcy.

The only disputed questions, therefore, are as to the insolvency, and as to the existence of reasonable cause for Mr. Bacon's believing the insolvency and the illegal purpose of the deed.

As to the first point, there is *now* no doubt that the grantor in the deed was, in fact, insolvent. His whole assets brought, at what are claimed to have been good sales, forty thousand dollars, and his liabilities were, one month after the bankruptcy, about fifty-four thousand dollars. There is no reason to believe that there was a change for the worse in his affairs in so short a period, or that his energy, skill, and credit could have made good the deficiency after the developments and occurrences of the 28th of October. A creditor, within one month after the deed, filed a petition charging bankruptcy, which was not contested. Mayo *was* insolvent in point of fact.

The only question left, therefore, is whether Mr. Bacon had reasonable cause to believe that he was insolvent, and made the deed to prevent the equal distribution of his effects contemplated by the Bankruptcy Act. But for the transactions out of which this deed directly grew, I should strongly doubt whether Mr. Bacon did have reasonable cause to believe the two things mentioned. Looking at the condition of Mayo by the lights existing at the date of the deed, and not by those by which his then condition is now revealed, Mr. Bacon may not have had reason to

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believe that he was insolvent and made the deed as an insolvent, *except for the especial facts out of which the deed directly grew*. But those especial facts were sufficient beyond all doubt to create that "reasonable cause" of belief which the law makes requisite in such a case. Mayo had been clandestinely overchecking and fraudulently using the money of the bank for several months before the date of the deed, in collusion with the teller. The question for us is, why had he been thus fraudulently using these funds? His position in society and in business forbids the presumption that anything but necessity had driven him to such a course. We are obliged to conclude that he used the money of the bank because he could not meet his current obligations with money obtained in an honest manner. The latin word *solvere*, when used with reference to debt, means *to pay*, that is to say, to discharge with *money*. Insolvency means inability to pay with money. The fact that Mayo was unable to meet his debts with money honestly obtained, and had been so for several months, proves that he was insolvent, in the sense that any trader is insolvent in contemplation of law. Moreover, when his fraudulent dealing with the money of the bank was about to be publicly disclosed in October, any man of his position, pride, and character would have exhausted every effort to pay up all dues on the spot, to save both character and credit, and doubtless he did so exhaust every effort. But he did not pay up on the spot, and the conclusion is irresistible that he did not make his default good in cash, *because he could not*.

The insolvency which had been concealed by clandestine transactions for months was now developed and undeniably proved. None knew the facts which established it better than Mr. Bacon. The deed in question was taken because the grantor was unable to pay the money which it was given to cover and secure. The deed is itself, under these circumstances, the evidence of insolvency, and Mr. Bacon, in accepting it, accepted the most conclusive confession, proof, and notice of the insolvency which could have been brought to his mind.

Being made by an insolvent man, being made to give a preference to Mr. Bacon's bank, it must have been made with the intention of intercepting from other creditors their *pro rata* share

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of the assets conveyed, for no principle has been more often decided, than that men must be presumed to intend the natural effects of their acts, and Mr. Bacon not only had reasonable but conclusive cause to believe that it was such a deed, made for such a purpose. As to the presumption of intention from the act itself, the authorities are too numerous to be cited. Some of them are in 13 Wallace, 40; Lowell, 409; 1 Dillon, 115; same, 203; 17 Wallace, 473; 14 Wallace, 87; 1 Abbott C. C., 440; 2 Bond, 244; same, 287.

The peculiar circumstances out of which the deed in question arose, distinguish the case now under consideration from those of *Toof v. Martin*, 13 Wallace, 40; *The Traders' Bank v. Campbell*, 14 Wallace, 87; *Gibson v. Warden*, 14 Wallace, 244; *Tiffany v. Lucas*, 15 Wallace, 411; *Buchanan v. Smith*, 16 Wallace, 277; *Wager v. Hall*, 16 Wallace, 584; *Walbrun v. Babbitt*, 16 Wallace, 577; *Wilson v. City Bank*, 17 Wallace, 473; *Bartholomew v. Bean*, 18 Wallace, 635; *Cook v. Tullis*, 18 Wallace, 332; *Tiffany v. Boatman's Saving Inst.*, 18 Wallace, 375; and *Clark v. Iselin*, to be reported in 21 Wallace.

The condition of Mayo in respect to his circumstances and transactions other than those connected with this deed were elaborately discussed by counsel for the defence, and those circumstances were such, I admit, as were hardly sufficient of themselves to constitute reasonable cause to believe that he was insolvent, and that any deed of preference he might make to secure a pre-existing debt must be intended to defeat a *pro rata* distribution among his creditors. But the especial facts inducing the deed were too cogent to admit a doubt in any dispassionate mind of the insolvency and of the intent necessarily involved in the execution of a deed under these circumstances. I ascribe Mr. Bacon's failure to appreciate the *reasonable cause* which the facts of the occasion presented to the excitement necessarily controlling the presiding officer of a bank upon just discovering a heavy default, which is popularly reported to have been \$30,000 or \$40,000, in a trusted subordinate. The law does not require that the *reasonable cause* it specifies shall be *perceived* by the beneficiary of a deed of preference, but only that it shall

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exist. 13 Wallace, 40 ; 16 Wallace, 584 ; 10 B. R., 21 ; 18 Int. Rev. Rec., 190.

That reasonable cause did exist in this case seems to me to be incontrovertible, and if such a case as the present one do not fall within the meaning of the first clause of the 35th section of the Bankruptcy Act, I can scarcely conceive how any case likely to be contested at all can be held to do so.

I will give a decree setting aside the deed as void, and granting leave to the bank to appeal to the Circuit Court within ten days from its date.

Upon appeal, the Circuit Court affirmed the decree in this case in the following opinion by the Chief Justice :

WAITE, C. J.—We are entirely satisfied with the conclusions reached by the district judge in this case. His findings of the material facts are fully sustained by the evidence, and they need not be recapitulated.

There can be no doubt of the actual insolvency of Mayo when he made his mortgage to the bank, though it may not have been generally known. His property, if converted into money, would have fallen far short of the amount necessary to pay his debts. While, therefore, he had not openly stopped payment, he was really unable to discharge his obligations in full.

In our opinion, too, the bank had reasonable cause to believe him insolvent. It matters not what the bank officers actually did believe, or what others believed or had cause to believe. The question is, What ought the officers of the bank to have believed from the evidence in their possession? They knew that he owed their bank a debt which had been surreptitiously contracted by corrupting their teller, and they were told by his counsel, in the progress of their negotiations for the mortgage, that similar irregular transactions had been going on for many months previous. In fact they were told that a check for seven hundred dollars, found in the teller's cash drawer, dated a year and more before, was probably "Mayo's fee to the teller for using the bank." While others may have considered him solvent because his paper was not found on the street, they knew that to save

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his reputation upon the street he was dealing clandestinely with their teller, and obtaining through him accommodations which they were themselves unwilling to grant.

This debt, when discovered, he did not offer to pay, but proposed to secure upon long time, and at a reduced rate of interest. They made no examination into his affairs themselves, but trusted entirely to the representation of his counsel. The mortgage was received without being executed by his wife, and there is some evidence to show that this was done because of a fear of the consequences of delay. No examination of the records was made to ascertain the condition of the title to the property, but in this, as in other things, the statements of Mayo's counsel were accepted as true. If an examination had been made, they would have discovered, that within less than a month before, he had obtained a loan of ten thousand dollars, at twelve per cent. interest and secured it by a mortgage upon the property. With even this extraordinary addition to his available capital, he was not relieved from the necessity of "using" their teller. They would also have discovered an unpaid mortgage of seven thousand dollars and more for purchase-money, which had not been disclosed to them. But there is no use in proceeding further. The evidence of insolvency was open to them in every direction, and they were certainly put upon inquiry. They are, therefore, chargeable with notice of all that, in the exercise of reasonable diligence, they could have known. No prudent business man, with the evidence before him which was within their reach, and which they ought to have considered, could possibly have come to any other conclusion than that Mayo's condition was utterly hopeless.

The mortgage, if sustained, will actually have the effect of giving the bank a preference. The secured debts, at the time the mortgage was executed, amounted to \$17,500 or thereabouts, and the unsecured to \$49,000. The total value of the assets was \$40,500. After the secured debts were deducted, only \$23,000 was left to pay \$49,000. The debt to the bank was \$8000, and when that was secured there remained only \$15,000 to meet the \$41,000. As every man is presumed to intend the necessary consequences of his acts, the presumption is that Mayo, by his mortgage, intended to give the bank the preference it apparently

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secured. This presumption continues until it is overcome by proof that he was ignorant of his insolvency, and that his affairs were in such a condition that he could reasonably expect to pay all his creditors in full. *Toof v. Martin*, 13 Wall., 40. There is no such proof. On the contrary, the evidence is all the other way. Within a month proceedings in involuntary bankruptcy were begun against him to which he made no defence, and the usual adjudication was entered upon default.

As the bank is charged with notice of his insolvency, they must also be charged with notice of his intention to give them a preference contrary to the requirements of the bankrupt law. It follows that under the operation of that law their security must fail.

The bank officers have not been guilty of any moral wrong. Finding Mayo a debtor of the bank without their consent, they set about securing protection against loss. Although they knew, or had reason to believe, he was insolvent, they were under no obligation to put him into bankruptcy. A mortgage would be good as against everything but the contingency of his bankruptcy. They had the right to take their chances against the happening of such an event. If he escaped bankruptcy, the debt was secured. If not, what they did would be void.

They took the risk, and have lost.

A decree may be entered affirming that below.

United States Circuit Court, District of Maryland, January, 1877.

JOHN C. BIRDELL v. THE HAGERSTOWN AGRICULTURAL
IMPLEMENT MANUFACTURING COMPANY.

On a motion for commitment for contempt for violating an injunction issued upon a patent, the question as to whether the machine constructed is the same as the old one enjoined, is one of fact, to be determined on the evidence.

In determining this question, accurately constructed models of the two machines are the best means to enable the court to judge whether one machine differs in principle and mode of operation from the other.

Statement of the case.

In the absence of models, the testimony of experts who have examined the two machines is controlling.

The rule is, that courts of equity will never attach unless the violation of the injunction is plain and clearly proven to the court.

Birdsell's invention construed to be for the combination of a pure threshing cylinder with a pure hulling cylinder, and defendant's present machine for the combination of two hulling cylinders, and although the first cylinder in the present machine may separate the straw from the heads by a rubbing action, it is not a pure threshing cylinder, and, therefore, not an infringement of Birdsell's claim.

A MOTION for an attachment to commit defendants for contempt of court.

In 1874 the complainant sued the defendants for infringing upon his reissued patent, granted April 8th, 1862, as a reissue of the patent originally granted him May 18th, 1858, for improvement in machines for threshing and hulling clover-seed. This patent had been sustained in a very extended litigation in the Northern District of Ohio by Justice Swayne, and the defendants in those cases had been enjoined. Thereupon the present suit was brought, and it appearing to the court that the defendant used substantially the same devices as the defendants in the Ohio cases, a preliminary injunction issued against them under the patent in the fall of 1874. Afterwards they constructed a machine to accomplish the same purpose as the old one which had been enjoined, to wit, to pull out the seed. It was constructed, however, with certain changes, and the question heard by the court on the motion for commitment was, whether or not the changes that had been made by the defendant carried the machines outside the Birdsell patent.

Birdsell's patent had three claims, as follows:

"1st. I claim the arranging and combining in one machine, the cylinder which threshes the bolls and seed from the straw or stalks, and the cylinder which hulls the seed so that the bolls and seed threshed may be hulled before it, the seed, passes out of the machine.

"2d. In combination with the threshing and hulling cylinders, I claim the bolting, or screening, and fanning apparatus, which separates bolls and seed from the straw or stalks and delivers them to the hulling cylinder.

Statement of the case.

"3d. In combination with the threshing and hulling cylinder, I claim the screening and fanning apparatus, which separates the hulls or bolls, and cleans the seed after it leaves the hulling cylinder."

It will be observed that the first claim was for the combination on one machine of a threshing cylinder to thresh the bolls from the straw; with the hulling cylinder, to hull the seed out of the bolls after they had been threshed from the straw. The second claim included this threshing cylinder and hulling cylinder as part of the elements claimed, adding other elements to them. This is also true of the third claim. The question was, therefore, raised on the first claim of the patent, the defendants claiming that they did not take the threshing cylinder contemplated by the Birdsell patent, it being conceded that they had the other parts. As this threshing cylinder was one of the elements of each claim of the patent, it was conceded that if they did not have this they did not infringe.

It appeared that, in the cases at Cleveland, wherein Birdsell's patent was first sustained, the defendants had set up in defence a machine made by one Rowe, in Virginia, before the date of Birdsell's invention. At the hearing of those cases, Birdsell's counsel claimed that the Rowe machine was not an anticipation of Birdsell's invention, for the reason that although it had two cylinders, yet the first cylinder was not a pure threshing cylinder; that it differed from Birdsell's in the following particulars:

1st. That the spikes on the cylinder were bearded for the purpose of grinding or tearing, whereas the spikes on the Birdsell cylinder were smooth, for the purpose of knocking off the bolls by a knocking action.

2d. That the cylinder of the Rowe machine was covered with punched sheet-iron for the purpose of assisting in tearing off the hulls from the seed, whereas the cylinder of the Birdsell machine was smooth, so that it might not operate in this manner.

3d. That the concave underneath the cylinder of the Rowe machine was lined with punched sheet-iron to assist in the hulling operation, whereas the concave of the Birdsell cylinder was smooth.

4th. That the concave in the Rowe machine extended around

Statement of the case.

far under the cylinder, so that the action of the cylinder and concave upon the seed might be kept up for some time during the progress of the bolls between the cylinder and concave, whereas the Birdsell concave was very narrow, so that the operation of hulling might not be performed, and that the result of these differences in construction was that the first cylinder of the Rowe machine hullled more seed than the second cylinder.

Now the defendants, the Hagerstown Company, in constructing their new machine, had departed from their old one in the same direction that the Rowe machine, earlier than Birdsell's, departed from the Birdsell. They had introduced into its first cylinder hulling devices, so that it hullled seed at the same time that it threshed the bolls from the straw. It was not the same cylinder and concave that Rowe had. It was a better one, and covered by patents recently granted to the Hagerstown Company, yet it had roughened spikes, a roughened concave, and a broad concave. It was therefore contended by the defence that this cylinder was not a threshing cylinder, but a hulling cylinder, as those terms are employed in the art of clover hulling, and that Birdsell in his case at Cleveland, in attempting to avoid the Rowe machine, had limited the claim to the first cylinder, constructed with purely threshing devices, and without hulling devices; and that now, his patent had been sustained, he could not extend it over a machine, the first cylinder of which was constructed with hulling devices.

The defendants contended that it appeared from the evidence that defendant's machine took the long straw with the clover on into the machine, and threshed the bolls from the straw, and hullled out the seed in one operation; and that it therefore accomplished the same purpose as Birdsell's, and that inasmuch as the first cylinder was so constructed that it was capable of threshing the bolls from the straw, it made no difference if, in addition to that, it also hullled out considerable seed. A large number of affidavits of experts were introduced on either side as to the operation of the machines.

Leverett Leggett, Wells Leggett, and Mortimer D. Leggett, for the complainant.

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*Archibald Sterling, Robert H. Parkinson, and John E. Hatch,
for the defendants.*

BOND, C. J., and GILES, J.—The injunction in this case was to restrain the defendant from making, or using, or vending any combined machinery for threshing and hulling clover-seed, made in accordance with any of the inventions specified or claimed in any of the claims of the complainant's reissue patent 1299, or such as they have heretofore made and sold.

Petition now is for an attachment against defendant for violating this injunction by making and selling machines containing a threshing and a hulling machine combined, as patented to complainant in the first claim of his patent.

The defendant denies that it has done this, but that the machines made and sold by it are substantially different from what it made before the issuing of said injunction, and from the machine described in complainant's patent, No. 1299.

This is largely a question of fact, and many affidavits have been submitted to the court by the counsel for the respective parties.

The complainant has filed the affidavits of Frank Millward, an expert, Joseph W. Dougall, John C. Birdsell, complainant, and Hiram King, four in all. The defendant has filed affidavits of William C. Dodge, J. F. Reigart, L. W. Downing, Jacob Downing, Jacob W. Zantzinger, John Weller, S. C. Dowin, and A. Miller, eight in all.

In considering the question of a violation of an injunction, the court cannot but regret that they have not been furnished with models of the machine patented by Birdsell, and the machine which he alleges to be a violation of the first claim of his patent. The court can always best judge from models whether one machine differs in principle and mode of operation from another. In the absence of such evidence the court must look to the testimony of the experts who have examined the two machines. Now, it is a rule governing courts of equity in such cases that they will never attach a defendant for contempt where the violation of the injunction is not plain, and proved to the satisfaction of the court. So far from a violation being proved in the case,

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the evidence of the witnesses clearly shows to this court that the two machines are different in their mode of construction, and it is for the court to decide whether there is a substantial difference in the principle upon which they act. Now, the expert produced by complainant swears that they are substantially the same, but the two experts on behalf of defendant, Regart and Dodge, both men of great experience in such matters, testified that the machines now made by defendant do not contain a feature of Birdsell's first claim. This, the court thinks, is fully sustained by the written evidence in the case. Birdsell's patent is for a combination of a pure threshing cylinder with a pure hulling cylinder; the defendant's machines contain a combination of two hulling cylinders, and although the upper cylinder may in some measure separate the straw from the head by rubbing or threshing, it is not a pure threshing cylinder; this has been done in machines made and patented before the date of Birdsell's patent, as will be seen by the diagrams I, K, and L attached to the deposition of Dodge, filed in this case. The court will therefore dismiss the motion for an attachment in this case.

United States Circuit Court, District of Maryland.

**JOHN C. BIRDSELL v. THE HAGERSTOWN AGRICULTURAL
IMPLEMENT MANUFACTURING COMPANY.**

Where a suit upon a patent is pending against the defendant, who is manufacturing and vending an article claimed to be an infringement of the patent, and it appears to the court that the defendant is responsible for such profits and damages as may be assessed against him as the result of the suit, the court may, in its discretion, enjoin the complainant from bringing suit against the vendees of defendant. This is true, although the complainant enjoined may not be within the district at the time of the injunction, as by reason of bringing the suit he has given the court jurisdiction over him for such purposes as may be necessary to do full equity between the parties in relation to the subject-matter of the suit.

Opinion of the court.

MOTION to enjoin complainants from bringing suits against the defendants' vendees.

In this case an injunction had been issued restraining defendants from infringing on the reissued patent granted complainant May 18th, 1858, reissued April 8th, 1862, for an improvement in machinery for hulling and threshing clover. The defendants afterwards changed the construction of their machine, and proceeded to sell clover hullers of the changed construction. On a motion made by complainant to commit them for contempt of court, for violating the injunction issued against them, by selling machines of this changed construction, the court held that on the showing made the machines were substantially different from Birdsell's patent machine, and therefore dismissed the motion. (See *Official Gazette*, March 13th, 1877.) Thereafter, complainant notified several of the vendees of defendants, some of whom were using the original machine that had been enjoined, and some of whom were using the machine as it had been changed, that unless settlement was made with him forthwith, suit would be brought against them. Defendants thereupon moved, upon a cross petition filed in the original case, for an injunction to issue against the complainant, restraining him while the original suit was still pending against them, under which damages and profits could be collected for all the machines that they made and sold, from bringing any suit or threatening to bring any suit against any vendees of theirs, based upon a user of a machine that might become subject of account in the original case.

Counsel for defendants, seeking the injunction against complainant, based their motion upon the general equity jurisdiction of the court; that inasmuch as complainant had submitted himself to the jurisdiction of the court to obtain relief against the defendants, he was also subject to the order of the court in relation to any matter relating to the granting of that relief; that the defendants were thoroughly responsible, and that upon the original suit being carried on to completion, if recovery was made, the complainant would recover in that suit all the profits that defendants had obtained from the wrongful manufacture, and the damages that he had suffered by reason of the wrongful

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manufacture, and that complainant would therefore be put in the same position as if he had originally sold all the machines. That this being the case, he ought not to be allowed to interfere with the vendees of defendants while the suit against them was pending. In support of their position they cited the decrees of Judge Drummond in the case of *Isaac W. Burnum v. Herman B. Goodrich*, entered in United States Circuit Court for the Northern District of Illinois, July 2d, 1873, wherein the complainant having brought suit against the defendant, and obtained an order for defendant to keep an account of the sale of the devices alleged to be an infringement, was enjoined from prosecuting suits already begun by him in other circuits against the defendant's vendees, and from bringing any further suits against defendant's vendees; also the decree entered by the Hon. H. H. Emmons, United States Circuit Judge, and Hon. P. B. Swing, United States District Judge, in the Circuit Court of the United States for the Southern District of Ohio, in the case of *Hezekiah B. Smith v. J. A. Fay & Co.*, restraining the complainant from bringing suit against the defendant's vendees in other circuits, the complainant in this case having obtained an interlocutory decree, and a reference to the master, and the suit being at that time pending before master on the question of the account.

The defendants relied upon the fact that the complainant was a resident of Indiana, and not before the court, and had sought the jurisdiction of the court for the purpose of bringing the suit, and for no other purpose. He was not therefore subject to any order upon him, that the court could not enforce an order if it made one, and it would not do an idle thing. Respondents insisted that the order could be enforced by dismissing the suit, by a fine, or, if complainant should afterwards come within the district, by imprisonment.

The respondents asking the order were represented by A. Sterling, Esq., and Hatch & Parkinson, of Cincinnati; the complainant by M. D. Leggett & Co., of Cleveland.

The following was the decree entered by the court:

This cause coming on, etc., on petition of defendant for injunction against complainant, to restrain him from prosecuting or

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threatening to do so, suits against any vendee of defendant for use or sale of clover hullers made by defendant, and sold by them, and it appearing to court that complainant has threatened to bring such suits, while suit is pending by him in this court against defendants, the manufacturers, the court doth order that complainant be restrained from commencing prosecution, or threatening so to do, any suit against any vendee of defendants, for an alleged infringement of the letters patent involved in this case, and on which this case is brought, based on any user or sale by said vendee of any clover machine purchased of defendants. Provided, defendants within thirty days file a bond in the sum of \$5000, with security to be approved by the court, for payment of any damages that may be adjudged against defendants in this suit, and shall also file a sworn monthly statement of the number of clover machines hereafter made and sold by them.

Both judges concurred in this.

*United States Circuit Court, District of South Carolina, at
Charleston, December, 1874.*

CHARLES KERRISON, ASSIGNEE, v. A. T. STEWART & Co. *et al.*

Though a plea to the jurisdiction of a United States district court for irregularity in the process, if taken, might have been sustained, yet if it was not taken, and the defendant appeared, pleaded, and went to trial, and there was judgment after verdict, another United States court will treat the judgment as valid and binding.

When, by act of Congress, a district court of the United States is invested with circuit court powers (see Section 571, Rev. Stat. United States), it is not thereby constituted a circuit court, it possesses those powers only in the territory of the district named by the act of Congress, and neither the justice for the circuit, nor the judge for the circuit of which the district is a part, can sit in such district court.

There is no authority of law for removing civil causes, irregularly brought in the circuit court of the United States proper for such district, into such district court.

Opinion of the court.

IN equity.

BOND, J.—In the year —, A. T. Stewart & Co. recovered a judgment in the District Court for the Western District of South Carolina, which court by law is clothed with circuit court powers within that district, against Kerrison & Leiding, now in bankruptcy.

Kerrison & Leiding, before the rendition of said judgment, had made a deed of assignment for the benefit of certain creditors, which deed Stewart & Co. successfully assailed in the courts of the State as fraudulent; and the judgment in that case, in which the trustees were parties defendant, bound the cestuis que trust also. Kerrison & Leiding then applied for the benefit of the Bankrupt Act, and were adjudicated bankrupts subsequently to the date of the judgment recovered in the District Court of the United States.

Stewart & Co. claim to have a lien, by virtue of their judgment, upon the lands of said bankrupt which came into the hands of the assignee. This claim is contested because it is alleged that the record of the said judgment is irregular and imperfect, first because the writ was tested in the name of the Chief Justice of the United States, though the writ was in a district court, and was made returnable before the clerk of the Circuit Court of the United States at Charleston, which is not within said district, who was likewise the clerk of said district court, instead of being returned to rules in the District Court.

There are other irregularities set forth in the statement of facts, which it is not necessary to notice, because notwithstanding them all the defendants in this action appeared, pleaded, and went to trial before a jury of the District Court of the Western District, without plea to the jurisdiction, and without any complaint or notice of the irregularities in question, or any of them.

Under these circumstances, it must be considered that all errors in pleadings and all irregularities in the filings of the pleas or declarations, and of returns to the process, were waived, and if this were not so, there is no remedy for the defendants except by appeal or writ of error to set the judgment aside, or to reverse it. It cannot be inquired into in this collateral way.

I am of opinion that the judgment of *A. T. Stewart & Co. v. Kerrison & Leiding* is a valid and subsisting one, and that they are

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entitled to be paid out of the proceeds of such of the real estate of the bankrupts as it was a lien upon, according to its priority.

While the court refuses to set aside this judgment on account of the irregularities complained of, it cannot refrain from saying, for the benefit of the profession, that in its judgment a plea to the jurisdiction of the District Court at Greenville would have been well taken. That court is not a circuit court.

Neither the Chief Justice of the United States nor the circuit judge, who are required by law to hold circuit courts, can hold or assist in holding the District Court for the Western District of South Carolina. That court, held by the district judge, has circuit court powers within the territory prescribed by law for its jurisdiction, which any person legally entitled may invoke at pleasure; but there is no authority at all for removing causes originally brought in the Circuit Court of the United States to that court, against the consent of parties, except in certain criminal cases at the instance of the district attorney.

I am aware that the practice to do so prevailed for some time, but it has produced great confusion, and has no warrant in law.

United States Circuit Court, District of South Carolina, Dec. 1877.

GREGORY A. PERDICARIES v. THE CHARLESTON GASLIGHT
COMPANY.

Stock in a corporation in South Carolina owned, during the civil war, by citizens of the United States, sequestered during the period of war by a confederate court, and sold to citizens of South Carolina at first and second-hand, did not pass by such proceedings to the purchasers, but belongs still to the loyal citizens against whom it was sequestered.

IN equity.

On the 30th August, 1861, the confederate States passed an act in retaliation for the act of the 6th August of the United States, sequestering, with few exceptions, the property of loyal citizens found within their territory. The proceeds of sale of such sequestered property were paid into the confederate treasury, to

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be held as an indemnity to those suffering loss under said act in the United States. Shortly thereafter a vigilance committee in Charleston reported to the officers charged with the execution of this act, that certain shares in the Charleston Gaslight Company were held by such loyal citizens.

Pursuant to the act a writ of garnishment was served on the company, requiring it to make return of its shares so held. On the 27th September, 1861, the company made its return, setting forth that fifteen (15) of its stockholders were, as far as your deponent is informed, living in the several cities of the United States hereinafter set forth, but it cannot pretend to determine whether or not they are alien enemies; and that these held four thousand two hundred and sixty-six (4266) shares, and were entitled to four thousand and two hundred and sixty-six (4266) dollars as dividends. Of these, thirteen citizens of New York, Pennsylvania, and New Jersey, were adjudged such alien enemies, and their shares (3766) and their dividends (\$3766) were sequestered, the shares being transferred to the confederate States court on the books of the company, and the dividends being paid to the officers of the confederate States. The names of the loyal stockholders were erased from the list of the company's stockholders. After advertisement, giving the fullest notice of the sale, these shares were sold at public outcry, and purchased in various parcels by eighteen persons to whom, on the orders of confederate State officers, scrip bearing the same number as those of the loyal stockholders were issued. Subsequently, 1000 of these 3766 shares were sold to other persons, viz., E. M. Black, William Carrington, Dewing, Thayer & Co., G. F. Jackson, Peoples' Bank of South Carolina, and H. H. Williams. Black was a director, and attended all the meetings of the board, which considered the orders of the confederate States court.

The company followed the advice of eminent counsel in obeying the mandates of this court, and, in fact, the penalties for disobedience were very heavy, and no appeal possible, except on giving heavy security. The holders of the sequestered stock alleged that the company colluded with the officers of the confederate States, in the sequestration of the shares of the loyal stockholders, but failed, absolutely, to prove this. Shortly after

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the capture of Charleston, the military seized the works and property of the gas company as captured property, and turned them over to the Treasury Department, by which they were restored, on conditions that the loyal stockholders were paid, or secured payment, of all back dividends, and that the names of those holding sequestrated stock should be erased from the books of the company, and those of the loyal stockholders put in their places. In fact the property was not restored till these conditions were performed. The holders of the sequestrated stock claimed that their scrip be also acknowledged as genuine, and threatened to bring suits to establish their claims. The company not moving in the matter, the complainant filed his bill to enjoin such suits, and to have the rights of all the parties adjudicated, claiming that the sequestrated stock was void, not only as issued in hostility to the United States, but as contrary to the company's charter. The holders of the sequestrated stock, both at first and at second-hand, were all made parties defendant. Against some, the bill was taken *pro confesso*; and others filed answers, claiming that they were entitled to have the stock declared valid, or to have the damages allowed to them. The company were chartered by a public act, and the new scrip was clearly void as an overissue of stock, contrary to the provisions of the charter; but the following decision of the court was not rested on this latter ground alone.

BOND, J.—It has been so often decided that acts in furtherance or support of the rebellion against the United States, or intended to defeat the just rights of its citizens, are null and void, that nothing more than the statement of the facts is necessary to show that the holders of all the sequestrated stock, both the purchasers at first-hand as well as the purchasers at second-hand, have no rights in the premises, and are entitled to no damages.

It is, therefore, ordered, adjudged, and decreed that the scrip issued by the defendants, the Charleston Gaslight Company, in lieu of the shares of the loyal stockholders, sequestrated by the so-called confederate States, and now outstanding in the names of Thomas Barrett, Otis J. Chaffee, Isaac S. Cohen, John Fraser

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& Co., Artemus Gould, A. H. Hayden, James Hope, B. D. Lazarus, M. C. Mordecai, B. O'Neil, William Carrington, Dewing, Thayer & Co., G. F. Jackson, The People's Bank of South Carolina, and H. H. Williams are absolutely null and void, and the holders of them will surrender them to the company to be cancelled.

The injunction heretofore granted in this case, enjoining all and singular the defendants in this cause and the holders of the said certificates of stock, issued in lieu of the sequestered stock, their agents, officers, servants, and attorneys, from bringing or prosecuting any suit or suits, action or actions against the said Charleston Gaslight Company, for and on account of said certificates of stock, or any of them, or of the stock purported to be represented thereby, or of the acts of the said company in creating the same, or for any damages claimed by reason of the issue of said stock, or any act or thing connected therewith, or arising thereout, is made perpetual.

*United States Circuit Court, District of South Carolina, at
Charleston.*

**WILLIAM L. BRADLEY v. THE SOUTH CAROLINA PHOSPHATE
AND PHOSPHATIC RIVER MINING COMPANY.**

The Act of Assembly of South Carolina, of March 1st, 1870, "gives and grants" to the persons it names, "the right to dig, mine, and remove," for twenty-one years, "from the beds of the navigable streams and waters within the jurisdiction of the State, the phosphate rocks and the phosphate deposits" contained therein, and requires the grantees to pay the State one dollar per ton for every ton removed, requiring a deposit of \$500 in cash as a license for, and a bond in the penal sum of \$500, to be filed, conditioned for the faithful payment of the amounts accruing to the State.

Held, on a bill of injunction brought by the grantees against the defendants, a company subsequently chartered by the legislature, with similar rights and powers to those conferred upon the complainants by the statute of 1st March, 1870, that the complainants derived no exclusive privilege from the act first in date, and that the injunction must be refused and the bill dismissed.

Opinion of the court.

This case distinguished from that of *Massott v. Moses*, 8d South Carolina Reports (Richardson), 168; and assimilated to that of *Doe v. Wood*, 2 Barnwell and A., 724.

IN equity.

Bill for injunction, relief, etc.

BOND, J.—The bill in this case alleges that on the first of March, 1870, the General Assembly of the State of South Carolina passed an act, entitled “An Act to grant certain persons therein named, and their associates, the right to dig and mine in the beds of the navigable waters of the State of South Carolina, for phosphate rocks and phosphate deposits.”

The act, by its first section, “gives and grants to the parties therein named, and to such other persons as they may associate with them,” the right to dig, mine, and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina, the phosphate rocks and the phosphate deposits; and requires by its second section that they should pay the State one dollar per ton for every ton of such deposits or rock removed; and the third section of the act requires that the grantees file a bond in the penal sum of \$500, conditioned that they should make proper returns of the amount of phosphatic deposits removed, and that they should pay into the treasury, before commencing business under said grant, the sum of \$500 as a license fee.

The bill alleges the compliance of the parties with the terms of the grant, and asserts that by such compliance there was granted to the complainant and his associates the phosphate rocks and deposits themselves contained in the navigable waters of the State for the term of twenty-one years, and that by virtue of said act they have exclusive right to dig, mine, and remove such deposits.

The bill shows that, notwithstanding this, the General Assembly on March 9th, 1871, by virtue of an act entitled “An Act to charter the South Carolina Phosphate and Phosphatic River Mining Company,” granted to the persons therein named, and their associates, the right to dig and mine in the beds of the

Opinion of the court.

navigable streams and waters of the State for phosphate rocks and phosphate deposits, upon much the same terms as had been required in the first-named act. Under this second act the last-named company had proceeded to remove phosphates from the beds of the navigable waters in disregard of the exclusive right of the complainant.

The prayer of the bill is for subpoena and an injunction in the usual form.

The answer denies the exclusive right claimed by the complainant, and also the right of the complainant, Bradley, to sue in his own name, who does so merely upon an allegation that he, as a stockholder in the South Carolina Company, had requested his associates in the company to litigate the matter in controversy, and upon its refusal had brought suit himself.

The question to be considered, which is decisive of the case, is whether or not the grant to the complainant's company, by the act of March 1st, 1870, is a grant of an exclusive right to dig, mine, and remove the phosphatic deposits in the beds of the navigable waters of the State.

The terms of a grant which are claimed to confer an exclusive right must be clear and explicit, and without ambiguity must plainly express the intention of the parties. The grantees can claim nothing which is not clearly given by the act.

The grant of the right to dig for and remove the phosphate rocks in a particular place, is the grant of an incorporeal right. It is the grant of a right to be exercised upon the soil of another, to exercise which without permission would be a trespass in the grantee, and unless there be words in the grant which clearly express the intention of the parties to convey the whole body of the mineral to be dug and removed, it does not convey a corporeal hereditament, or any right in the soil itself.

But even were the words "the right" to be held *prima facie* to grant an exclusive right, other words of the act of March 1st, 1870, clearly show that this was not the intention of the legislature when it passed that act.

The grantees are not required by the act to pay for all the phosphate rocks in the beds of the navigable waters a gross sum, but are to pay the sum of one dollar per ton for every ton which

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they shall dig, mine, and remove, which, it seems to us, is conclusive that this was not a sale of all the rocks, but was a sale of so much as the grantees should choose to mine and remove at that price. And when the second section of the act of March 1st, 1870, provides that the grantees, before commencing, shall pay a license fee of \$5.00 for the privilege granted, it clearly shows that it was the intention of the legislature to grant a mere incorporeal right, and that the title to the phosphate rock was in the grantee only upon digging and securing it.

Under the complainant's construction, he might hold possession of all the phosphate rocks of the State for twenty-one years without having paid one cent for them to the State, for he is to pay nothing before commencing business, and by the terms of the act it is at his option whether he will ever begin to dig or mine.

This case is easily to be distinguished from the case of *Mas-sott v. Moses*, 3d South Carolina Reports (Richardson), 168, which is relied upon by complainant in support of his claim to an exclusive right.

In that case the court found words which gave the exclusive right. The grantor "sold and conveyed" the right and privilege of mining and removing all the minerals which the grantee himself found, or which were discovered by any other person, upon the land. The grantee paid a sum in gross equivalent to the value of all the minerals supposed to be on the land. The court held that the words "that may be found by any person or persons, or contained in any part of the land," excluded the grantor himself, and showed an intent to convey an exclusive right; and this, taken in connection with the fact that the consideration paid was an entire sum upon the delivery of the deed, established the intention of the parties.

But in the case before us there are no words used which, by implication, could exclude the grantor. There is no sale or conveyance, and no consideration paid, which could possibly be held to be the gross value of the phosphatic rocks in the beds of the navigable waters of the State.

It seems to us that this case falls precisely within the rulings of *Doe v. Wood*, 2 Barnwell and A., 724.

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The grantees, under the act of March 1st, 1870, can claim nothing, as we said before, which is not clearly granted by it. They cannot take anything by implication. Nothing passes but what, in explicit language, is given, and when the intention of the legislature is doubtful, the act must be construed against the grantees.

We think the injunction must be refused and the bill dismissed.

United States Circuit Court, Eastern District of North Carolina.

DUNCAN HOLMES & CARTER GRAY *et als.* v. W. P. OLDHAM
et als.

A bill of injunction will not lie in the United States Circuit Court to enjoin defendants, who are registering officers and poll-holders of election in a city of a State, from registering voters or holding an election in pursuance of State legislation and municipal charter.

IN equity.

Bill for an injunction.

BOND, J.—This is a bill to enjoin defendants, who are registrars and poll-holders of election in the city of Wilmington, North Carolina, from registering voters or holding an election under an amended charter of that municipality recently granted by the legislature.

The reason alleged by the complainant why this remedy should be given is that the law amending the former charter of that city is unconstitutional.

First. Because the districts into which the city is divided are largely unequal in proportion, though they have the same representation in the City Council, and that this is particularly true of the colored population, which, in the third district, is by itself as large as the population of both the other districts.

Second. Because the amended charter prescribes other qualifications for voters than are prescribed for voters in the Constitu-

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tion of the State, which are particularly oppressive to the colored people.

Whatever may be said of the propriety or impropriety of the legislature in question, we are of opinion that the remedy sought for is not a proper one. There is no special wrong or irreparable damage alleged to be done or threatened to the complainants in person or property, but the injury threatened is stated to be the fear of great disorder and confusion, which would arise where there were two contending bodies claiming to be the Common Council, and to be entitled to the government of the city.

The remedy for this is the writ of *quo warranto*, brought by those out of possession of the office against those who hold it, and we know of no case where a court of equity has interposed by injunction to prevent an election upon such general grounds of fear, common to all citizens, even if the law under which it was about to be held was clearly unconstitutional. As is said by the Supreme Court of the State of Pennsylvania, in Smith and McCarty's 6th Equity Reports, "The power ought to be plain to authorize courts to forbid municipal elections when ordered by the legislature," and we may add, that before they exercise it there should be some threatened irreparable damage to the person or property of those who seek the remedy.

If this election be an illegal, unconstitutional one, the remedy by *quo warranto* is complete. If it be a legal one, and the complainants or any of the citizens are deprived of their rights under the fourteenth or fifteenth amendments of the Constitution of the United States, there is ample remedy in the courts, by indictment and otherwise, under the acts of May 30th, 1870, and February 28th, 1871, to punish the wrong done and to restore the rights of the parties.

We think the injunction must be refused.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, November, 1876.*

ANDREW RUTHERGLEN, ASSIGNEE, v. SAMUEL WOLF *et als.*

Ex parte MAX COHEN.

The purchase of real estate in Virginia while a suit relating to it is pending in a court of the United States is invalid as against the plaintiff in such suit, although the *lis pendens* be not recorded as required by Section 5, Chapter 182, p. 1166, Virginia Code of 1873.

IN equity.

On the eighth day of November, 1867, Samuel Wolf made a deed, in which his wife joined, conveying a lot of land and house in Petersburg, to Eli Kull, a brother-in-law; the property being alleged to have been worth about \$2000, and the purchase price set forth in the deed being \$1700. Eli Kull was one of the sons of Jacob Kull, and a member of the firm of Jacob Kull & Sons.

Shortly after this, Wolf's stock of goods, worth some \$6000, was taken by process of distress issued by the said Jacob Kull & Sons, the principal part of which was disposed of under that process, but a part of the goods remained.

On the 4th of January, 1868, Wolf made a trust deed for the benefit of his general creditors, conveying the remnant of his stock of goods and the furniture in his storehouse for that purpose.

On the 22d of January, 1868, he filed his petition in bankruptcy in the United States District Court for this district, and Andrew Rutherglen was appointed his assignee.

On the 11th of February, 1869, the assignee filed his bill in this, the Circuit Court of the United States, against Kull and others, charging that the deed of November, 1867, and the distraining process afterwards instituted by Kull & Sons, were fraudulent transactions as between the bankrupt and Kull & Sons, and praying that the deed of the house and lot be set

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aside, and that Kull & Sons be made to account for the goods taken by them under their process of distress.

On the 27th of April, 1875, during the pendency of this suit, Eli Kull sold the house and lot in Petersburg to Max Cohen.

Cohen, on the 27th of October, 1876, filed his petition in this court, in this suit of *The Assignee v. Kull and others*, praying that he might be made a party defendant, which was done, and alleging that the said house and lot had been sold to him at public auction, after due advertisement, and publicly purchased by him in good faith and for full value, and without notice, direct or indirect, in any manner whatever, of the pendency of this suit, or of any suit in respect to the house and lot in question, or of any defect in Kull's title to the property; and alleging also, that no memorandum of *lis pendens* had been recorded by the complainant in this suit so as to affect him with constructive notice thereof. He claimed that, as a purchaser in good faith for full value, without notice, and in the absence of the docketing of a *lis pendens* as required by the code of Virginia, he is not bound by the proceedings in this court, and ought to be protected in his title by the court, and prays relief or remedy.

The deed of Wolf to Eli Kull was, in due course, pronounced fraudulent, null, and void, and was annulled and released.

On a hearing of this petition before Bond, Ct. J., it was adjudged and decreed, among other things, that Max Cohen being a *pendente lite* purchaser of the house and lot in the bill mentioned, from Eli Kull acquired no title thereto as against Wolf's assignee in bankruptcy, and that the said Cohen do deliver possession of the same to the said assignee, the plaintiff in this cause.

Statement of the case.

*United States Circuit Court, Western District of Virginia, at
Lynchburg, November, 1871.*

JAMES E. TYSON v. VIRGINIA & TENNESSEE RAILROAD
COMPANY, WM. MAHONE, PRESIDENT, *et als*.

By an act of State legislation, four independent railroad companies were authorized to be consolidated into one company, with provisions looking to the rights of the stockholders of each. Under this act, formal consolidation was carried into effect, and the charter and the formal consolidation had remained unimpeached for more than a year. On a bill brought by an owner of five shares in one of the companies (who had purchased fifty additional shares after consolidation), against the president and directors of that company, praying injunctions, and also on motion for temporary restraining orders,

Held, that the bill must be dismissed for want of proper defendants, especially for not making the president and directors of the consolidated company defendants, and that the temporary restraining orders must be refused.

In equity.

By an act of the General Assembly of Virginia, passed the 17th of June, 1870, four several railroad companies, whose lines stretched from Norfolk, via Petersburg and Lynchburg, to Bristol and beyond, were authorized to consolidate themselves into one company, by the name of the Atlantic, Mississippi and Ohio Railroad Company, upon such terms as the stockholders of each company in general meeting might agree upon, but with no power to compel any stockholder in any divisional company to exchange his stock in such company for stock in the consolidated company. There was a provision that as to such divisional stock as its owners should refuse or fail to convert into consolidated stock, the divisional companies should retain their corporate existence, in the stockholders' meetings of which the consolidated company should vote upon stock which had been converted at a rate of one vote for each share. The conditions of the act of June 17th, 1870, were complied with fully, and the consolidated company was formed in November, 1870.

One of the companies so consolidated was the Virginia and

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Tennessee Railroad Company, whose line of road extended from Lynchburg to Bristol. The common president of all four of the companies, before consolidation, was William Mahone, and he remained president of such company afterwards, and was elected the president of the consolidated company.

James E. Tyson, of Baltimore, was, before consolidation, owner of five shares of stock in the Virginia and Tennessee Company, and refused to convert them into the stock of the consolidated company. After the consolidation had been formally effected, he purchased additional fifty shares of the stock of the Virginia and Tennessee Company, from owners who had refused to convert them into shares of the consolidated company.

On the 13th of November, 1871, he filed his bill in this court, making Mahone, as president of the Virginia and Tennessee Company, and his directors parties defendant, reciting the foregoing among other facts, charging that the charter of consolidation of 17th of June, 1870, was void, and conferred no legal authority or power upon Mahone or his directors; that the organization of the Atlantic, Mississippi and Ohio Company was illegal; that the use of the property of the Virginia and Tennessee Company in the interest and under the direction of the consolidated company was illegal; that said Mahone had become president of the Atlantic, Mississippi and Ohio Company, and as such, with the direction of that company, had executed a mortgage upon the property of the Virginia and Tennessee Company, and of the connected companies, and were then negotiating a sale of the bonds, for securing which such consolidated mortgage was given.

The bill prayed that the act of consolidation, and the proceedings under it, should be declared void, and the deed of trust annulled and set aside; and, at this special term of the court, called to hear the complainant's motion after due notice, prayed for a temporary injunction restraining the said Mahone, president, and the directors of the Virginia and Tennessee Company from using the property of said company in the interests of the consolidated company, and from proceeding further with the sale of bonds under the consolidated mortgage, etc.

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BOND, Ct. J.—The court has listened with great interest to the argument of counsel in this cause, and hesitates to express any opinion until it has had opportunity to examine the large number of authorities to which they have been referred.

[The court heré gave its reasons for thinking the Atlantic, Mississippi and Ohio Railroad should be a party.]

Nevertheless so great pecuniary interests are involved in this suit, and the danger of loss to one of the parties, at least if the proper persons were made parties, would be so serious and immediate, that the court is inclined at once to determine the motion before it without attempting to decide any of the other questions affecting complainant's rights, which have been elaborately argued, and which will be more directly before the court at the final hearing of the cause.

What the court is now asked to do is to enjoin these new defendants, provided they are made parties, as they should be, by a preliminary injunction, from proceeding to execute any of the powers and franchises alleged to be granted to them by the act of 17th June, 1870, pending the suit.

This is to invoke the extraordinary power of this court, which ought not to be exercised unless the injury threatened the complainant be immediate, serious, and irreparable; and not then, if the damage to the defendants is likely to be greater than that of complainant, and equally immediate, serious, and irreparable.

It seems to the court that the complainant has neither of these reasons for asking the court to exercise this power in his behalf.

Whatever has been done by the defendants respecting the stock or property of the Virginia and Tennessee Railroad Company was done, or was contemplated to be done, twelve months before the complainant purchased his stock in the road, and the former owner of his shares was a participant in part of the proceedings which led to defendants' action. Complainant had full notice of what defendants were about to do, and if, under these circumstances, he purchased his stock in the Virginia and Tennessee Railroad Company, he voluntarily put his interest in jeopardy, and cannot call upon the court to exercise its extraordinary powers to protect him, pending a suit to determine his

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jeopardied rights, which had been in danger, if at all, twelve months before he voluntarily purchased them.

It is manifest to the court that the danger of loss to defendants in case the court should exercise the power invoked, if at the final hearing its judgment should be for defendants, is likely to be more serious and irreparable than any possible loss to complainant.

Credit is a delicate thing. Confidence in the power and right of defendants to make the pledges they have made to raise the money authorized by the act of June 17th, 1870, is absolutely necessary to the success of the loan.

In this suit defendants have at stake millions of dollars, while the complainant, at the commencement of the action, had but five shares of stock, which he alleges in his bill are in immediate danger of depreciation in value by defendants' conduct, which danger was not great enough to prevent his purchasing fifty shares more since the suit began.

Under these circumstances the court is of opinion that the complainant has no right to ask the court to exercise this extraordinary power.

Whatever rights or interests the complainant may have are in no danger of great or irreparable loss.

They may be fully determined and secured at the final hearing, without the aid of a preliminary injunction, and the court will refuse the motion.

RIVES, Dt. J.—This cause cannot now be heard by us in the breadth and to the extent in which the pleadings and arguments of counsel have claimed our attention.

The necessary parties are not here. We have no other parties before us but a solitary shareholder as complainant, and his company and its president as defendants. Nevertheless the rights, the acts, the lawful existence of another corporation, namely, the Atlantic, Mississippi and Ohio Railroad Company, have been the chief theme of discussion by counsel on both sides, and the principal topic of complaint on the part of the complainant. Yet this company has not been made a party by this bill, nor any officer thereof, in his character as such. The president of it is

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indeed a party, but wholly in his character as president of the Virginia and Tennessee Company, or else as an individual, uniting in himself the presidency of both companies, but nowhere in the bill called to account as the president of the consolidated company.

The corporation, thus overlooked as a party in these proceedings, is a most important one in the legislation of the State, both as regards the magnitude of its enterprise, the amount of its capital, the munificence of the State towards it, and the policy which it established.

It was created as a means of uniting in one organization four distinct lines of railroads, having one common object of attracting to our seaboard the trade of the West.

Its claims and rights, therefore, cannot be impleaded in a controversy confined to one of these four companies, and a member of it. The great object of this suit is to assail the validity of the charter of the Atlantic, Mississippi and Ohio Railroad Company, of a large loan recently effected by its president, and of a mortgage to secure it, and, further still, to arrest and defeat the negotiation and sale of the bonds of the company, based upon this mortgage. And the only pretext offered for this by the bill consists of the allegation that all this proceeds from the acts of William Mahone, the president of the Virginia and Tennessee Company, and, as such, constituting a breach of trust towards the complainant. But the mortgage, when exhibited in this cause, is shown not to proceed from William Mahone, as president of the Virginia and Tennessee Company, but from William Mahone, as President of the Atlantic, Mississippi and Ohio Company. It purports on its face to be a deed of this company alone. It would, therefore, be out of the power of this court, under the state of parties, to adjudicate the questions raised in argument, or to grant an injunction calculated to restrain a corporation or its officers who are strangers to this suit.

This defect is patent. It is sufficient to justify a refusal of the preliminary injunction asked for. Nevertheless it has not been availed of by the able counsel for the defendant. They have vied with the counsel on the other side in the elaborate presentation of the vital questions growing out of the act of the

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17th June, 1870. This defect can be readily cured by amendment, and with opinions already matured upon the instructive arguments we have heard, we may incur the repetition of the discussion, and be more regularly required to decide the issues that have been made before us. Without prejudice, therefore, to any future rehearing of the cause, when more regularly matured, I seem invited, by the course of counsel, at this time to indicate my conclusions from the learned and protracted debate we have heard. In an inferior court like this it may be of use in shaping the course of counsel, and narrowing the scope of their inquiries. Great public interests are also at stake in this litigation, and any opinions from the bench that may have the effect of composing this strife, disembarassing a great public work of suits, and defining the rights of private corporators connected therewith, are not improper on an occasion like this, but, on the contrary, calculated to subserve a good end. Under this impression, I proceed to give briefly the opinions to which I have been led by a careful consideration of the topics that have been so ably discussed before the court.

The chief reclamation in this cause, the gravamen of the complaint, is, that the act of June the 17th, 1870, commonly called the Act of Consolidation, operated a diversion of plaintiff's shares, profits, and franchises from the object to which they were pledged by his charter, to a different enterprise, in which he was not bound nor willing to embark. From the numerous authorities that have been cited to us I deduce this leading principle—that a charter involves two contracts: *First*, on the part of the State, as to the nature and limits of its grants; *second*, as between the corporators themselves, binding them collectively and singly by its terms. The perpetual obligation of the *first* was affirmed in the great Dartmouth College case. That decision has not been impugned, nor its authority shaken, by the prevailing spirit of change and progress. On the contrary, it has led to the now common reservation in charters, of the power to repeal, alter, or amend. In our general act of 1837 it takes the form of a privilege to modify, alter, or amend, so far as not to affect the rights of property. This legislative reservation clearly pertains to the *first* contract. The *second* one existing between the corporators

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is without its purview, because that is protected by a constitutional guarantee, which forbids its impairment by the State, either in the form of law or constitution. Hence I infer that any law which enters within the pale of a charter, and violates the contract subsisting between the corporators, by committing them or diverting their assets to any new work not embraced by their charter, is void, because subversive of the contract between themselves, and therefore obnoxious to the constitutional restriction. In such a case restraint by writ of injunction is appropriate, because it secures to a dissentient stockholder his full measure of protection under the constitution, both State and Federal. Any such abuse of the charter may also be corrected by the judicial application of the doctrine of "*ultra vires*." From this reasoning, therefore, it follows that the legislature cannot avail of this reserved power to free people of the obligation of their contracts. All it is intended for is to allow succeeding legislatures to limit, alter, or modify previous grants by the State of its public franchises, and can of necessity have no operation upon the *interior* contract existing in the body of the charter between its members.

Does the act of 17th June, 1870, militate against the principles thus announced? Does it infringe, alter, or pervert the rights of the shareholders in the original companies having severally charge of this continuous railway through the State? Does it *consolidate* these companies against the will of even a minority of the stockholders?

The *fundamental* provision of this act gives the negative to these questions. In the first, leading section of the act, no one share of the original pre-existing companies can be subscribed to or merged in the stock of the new company, or otherwise acquired by it, except upon the agreement of the shareholder. With this distinct and unqualified stipulation before us, we are challenged with a bare *parenthetical* implication, growing out of the eighth section, to the effect that these pre-existing companies are to be extinct upon their abandonment by a majority of the stockholders in each. This is but a cursory *implication*. How it came to be made, or with what purpose it was expressed, whether by way of inducement, suggestion, or coercion, is scarcely

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worthy of inquiry in my view; it is reprobated by the whole structure of the law. Though termed an act of consolidation, it does not of itself operate as such. It stamps on its frontlet and recognizes to its extremest limit the right of each and every stockholder in the pre-existing companies, and actually preserves their organizations so long as there are any to cling to them. True, it does not make ultimate provision for the case of stockholders who may not choose to cast their shares into the new concern. In other States, it seems, provision is made for ascertaining by commission the value of such shares, and providing for their *ademption* by the payment of such values. This ulterior arrangement was doubtless not made by this act, because of the confidence entertained by the legislature that in view of the great liberality of the State in the endowment of this new company, and the attractive policy and advantages of its charter, everything necessary or desirable would best be accomplished by treaty and agreement between the companies and private stockholders, whose interests were so perfectly akin to each other. At any rate, the dissentient stockholder is safe under the provisions of this act. Nothing can be done with his share or franchise without his assent. It is "*so nominated in the bond*." If he has not been fairly dealt with in the past, he has rights of contract by common law; he can enforce them at law or in equity, as he may choose to assert his claim. It is the manifest interest of all, and especially the duty of the great, overshadowing corporation—the Atlantic, Mississippi and Ohio Company—to seek and effect an early settlement with all and each of the shareholders in the original, outlying, and now nearly extinct companies, so as to be able to prosecute, with unity of effort and design, their important undertaking under one charter, and under the cheering auspices of a contented public, and a scrupulous regard for the rights of all who have had a share, however small, in these works. But if, perchance, injury has been done or is apprehended by dissentient stockholders, it does not present a case for injunction; it can be adequately redressed by damages; they can always demand and have a fair and just account of their corporate assets, and full satisfaction for their stock. But the action now asked against this company is a far different case.

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If you now arrest them in the negotiation of their loans, you give a fatal, incurable stab to their credit and works. An injunction against them at this time would be an irreparable injury. The apprehension of it at any future time, and in a perfected state of the pleadings, is so grave a matter as, in my opinion, to require the intimation now thrown out to counsel, that they are not likely hereafter, when they have been made proper parties to their bill, to get this court to intervene in this form of a preliminary injunction.

The view I have thus taken of the charter of the Atlantic, Mississippi and Ohio Company frees it of the constitutional objections urged against its validity. I have but little doubt these objections were present to the minds of the framers of this law when they drafted it. They have accordingly steered clear of them. It was not *enforced* consolidation. It was not a diversion of corporate property or franchises to a new undertaking not in the terms or contemplation of the original charter. It was a *tentative* measure toward consolidation. Its success all rested on the voluntary action of the stockholders of the separate companies. The State set the example of transferring its shares and bonds to the new company for a moderate consideration, and upon terms of long and generous indulgence. This example, combined with obvious considerations of private interest and public policy, was reasonably counted on as means to lead the private stockholders out of the old companies into the new all-embracing company, and thus to bring about the final abandonment of the old antagonizing charters for the one common harmonizing charter for all. Nor has the event disappointed this reliance. We are told that nearly all of the individual stockholders in three of these companies, and upwards of 8000 out of 12,000 in the Virginia and Tennessee, have taken refuge under the late comprehensive charter of June 17th, 1870. Doubtless this process of transfer is still going on, and will continue to go on. Until it is completed in the way designed by law, the courts will be open to adjust and liquidate the claims of all dissentient stockholders. In this very case, the bill may be amended and prosecuted as an original one, to give the complainant the benefit

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of any accounts he may choose to call for, and the relief to which he may show himself entitled.

The concession is due to the minority of stockholders, however small. Their rights are to be respected. However obstinate they may be in resisting overtures to subscribe their stock to the new company, no one, under the terms of this act, can demand a *reason* of them. "*Voluntas stat pro ratione.*" But I would not be understood as precluding the courts, on a proper case made, from interposing their rightful authority to settle these obstructing claims, and to remove out of the way a grand improvement ordained by the legislative will, rights unreasonably withheld, and admitting of just and full compensation.

While I thus state the case, and construe the rights of the minority, I must add that the majority have rights equally clear and indisputable, and among these I reckon the right to abandon and forsake their separate charters, and betake themselves to a common one more to their liking. The mode of exercising this right has been appointed by the act of 17th of June, 1870. That is essentially the aim, the scope, the effect, the operation of this act. It does nothing more. It is permissive, not mandatory. As the means, therefore, of accomplishing in the given emergency a public policy agreeable to the legislature, and promotive of that unity and harmony which it aimed to introduce in the conduct and completion of this work, I am free to say that I can conceive of no measure to this end less liable to constitutional objections than the act in question. I cannot, therefore, refrain from imparting at this stage of the proceedings these my strong convictions to the counsel, whose opposing views on this subject I have studiously considered and patiently weighed. As they have on both sides discussed these questions, I shall not, I hope, be accused of rashly prejudging them. But at the same time, I beg to assure them of my readiness to reopen the discussion at any future stage of this cause, when fully matured as to all proper parties, and invoke their assistance in a review of these opinions, with a full purpose on my part to discard the bias of all preconceived opinions as becoming the bench, where the pride of opinion should always yield to better thought, more

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patient investigation, and, above all, to the honest and brave pursuit of truth and justice.

John B. Baldwin and John W. Daniel, appeared as counsel for the complainant; and James A. Jones, W. W. Crump, Robert W. Hughes, and James C. Taylor, Attorney-General of Virginia, for the defendants.

*United States Circuit Court, District of Maryland, at Baltimore,
December, 1862.*

**THE CITY OF WHEELING v. THE MAYOR AND CITY COUNCIL
OF BALTIMORE, THE BALTIMORE & OHIO R. R. Co. et als.**

The power of the United States Circuit Courts to issue the writ of mandamus is confined to those causes in which it may be necessary to the exercise of their jurisdiction, and therefore such court may entertain a bill in chancery, in cases where mandamus would be an ample remedy in a State court, if it is not a necessary remedy in the United States Court.

Where an incorporated company would be the proper complainant in a chancery suit, but refuses or elects not to bring the suit when required by a stockholder to do so, and the controversy is between different classes of its stockholders, a court will entertain a bill, brought by a stockholder, to settle such controversy.

If a company be incorporated by two States, a citizen of one of the States may sue it in a United States court in the other State in which it is incorporated.

Corporations have no other power than such as are expressly granted by their charter, for as are necessary to carry into effect the powers expressly granted.

Under the charter of the Baltimore and Ohio Railroad, granted in 1826, and the subsequent acts of the legislature supplemental thereto, no express authority was given the city of Baltimore to appoint directors to represent an increase of stock derived from a stock dividend, and therefore an appointment by the city of four new directors to represent stock so derived, was held to be illegal.

IN equity.

This bill is filed by the city of Wheeling, as a stockholder in the Baltimore and Ohio Railroad Company, on behalf of itself and all others of the private stockholders who, being entitled, shall come in and contribute to the cost of this proceeding.

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After alluding to the original act of incorporation of said Baltimore and Ohio Railroad Company, the bill states that by the second section of said original charter, the said city of Baltimore was authorized to subscribe for 5000 shares of stock in said corporation, and that by a resolution of the mayor and city council of Baltimore, approved on the 20th of March, 1827, the mayor was authorized, in pursuance of said act, to subscribe in the name of the said mayor and city council for the said 5000 shares, and did so subscribe.

That afterwards, by an act of the General Assembly of Maryland, passed at December session, 1835, chapter 127, the said mayor and city council were authorized to subscribe for 30,000 shares of stock in said company, in addition to the subscription previously made by it, and above mentioned; and that by a resolution of the mayor and city council aforesaid, approved 17th of March, 1836, the mayor was authorized, in pursuance of said last-mentioned act, to subscribe for the said additional 30,000 shares, and did so subscribe. That the said 35,000 shares, so authorized to be subscribed for by the acts aforesaid, are all the shares in said company which the said mayor and city council of Baltimore have subscribed for to the capital stock of said company, and that the said mayor and city council hold no other shares in the capital stock of said company as subscribed for to it, except the 35,000 shares aforesaid.

That on the 17th day of December, 1856, the said Baltimore and Ohio Railroad declared an extra dividend of 30 per cent. on the capital stock of the company, payable on or after the 12th January, 1857, to all stockholders holding stock on the 22d day of December, 1856, in certificates of indebtedness, bearing an interest from the 1st day of June, 1857, of six per cent. per annum, payable half-yearly on the 1st day of December and June, in each year, until the 1st day of June, 1862, inclusive, after which last-mentioned date, by the terms of the resolution declaring said dividend, the said certificates of indebtedness should be converted into the stock of the said company at par.

That the whole number of shares of stock in the said company, on the 22d day of December, 1856, was 101,102 of which number on that day 59,246 shares were held by the private stockholders in said company.

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And that on the said last-mentioned day, the said mayor and city council of Baltimore held and owned no other stock in said company except the 35,000 shares which had been subscribed for by them as aforesaid.

That the certificate for the portion of the extra dividend above mentioned, belonging to the said mayor and city council of Baltimore, for and in respect of its said 35,000 shares, was duly delivered to them, and the interest thereon paid up to the 1st of June, 1862, inclusive, since which time, viz., on the 26th day of June, 1862, the said certificate has been converted, pursuant to its terms and the tenor of the dividend resolution, into stock of the said company, amounting to one million and fifty thousand dollars, and that said stock was not subscribed for by the said mayor and city council, or acquired by it in any other way than as heretofore detailed, viz., as the fruit and dividend of its 35,000 subscribed shares aforesaid. And it prays for an injunction against the mayor and city council of Baltimore to restrain them from appointing any persons as directors of the Baltimore and Ohio Railroad Company for or in behalf or in virtue of the stock in said company, acquired by them as and for a dividend under the extra dividend resolution passed by said company on the 17th December, 1856, and that existing appointments of any persons as such directors may be annulled and declared void, and that John A. Thompson, Henry S. Hunt, Aaron Fenton, and John Dennison may be enjoined from taking their seats as directors at the board of the Baltimore and Ohio Railroad Company, or acting in any way as such directors by virtue of their appointment made by the mayor and city council of Baltimore, on the 2d and 3d days of October, 1862, and that the said Baltimore and Ohio Railroad Company may be enjoined from permitting or suffering the said persons from taking seats at its board or acting in any way as directors under any appointments made or that may be made by the mayor and city council of Baltimore, in virtue of the stock so acquired by them as a dividend under the extra dividend resolution aforesaid. An answer has been filed by the mayor and city council of Baltimore, and also by Messrs. Thompson, Fenton, Dennison, and Hunt, the directors appointed by the said city in October last. These gentlemen

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adopt the answer of the corporation, which is at great length, and present several defences to the relief sought by the complainant. The Baltimore and Ohio Railroad Company have not answered the bill.

The corporation claims the right to appoint these four additional directors by virtue of the 7th section of the act of Maryland of 1826, ch. 123 (the original act of incorporation of the Baltimore and Ohio Railroad Company), and upon the construction of this act the merits of this controversy depend.

GILES, J.—Independent of the merits of this controversy, several objections have been taken by the learned counsel for the defendants to the right of the complainant to the relief sought by this bill. And I shall discuss them in the order in which they were noticed by the counsel for complainant—and first, that the proper remedy in this case is a mandamus which can give full and adequate relief if complainant is entitled to any; and that equity will never interfere by injunction where there is full and adequate relief in a court of law. I grant that if this were a case in one of the courts of our State, the objection would be unanswerable. The courts of the State, having full power to grant a mandamus where such a remedy is appropriate and adequate to give the relief sought, would not and ought not to interfere by the exercise of its equity jurisdiction, which supposes that the party has no adequate relief at law.

But how stands the matter in a court of the United States? By the 14th section of the Judiciary Act of 1789, chap. 20, it is enacted “that all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and *all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law.” It is under that part of the section I have italicized that the courts of the United States derive their authority to issue a mandamus. It is only in cases where it is *necessary to the exercise of their respective jurisdictions*. One of the learned counsel for the defendants contended that it was within the true meaning of this section, when the mandamus was issued in a case over which the courts of the United States

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had jurisdiction, from the character of the parties to it, or otherwise—although the mandamus might have been the original process in the case. But this is no longer an open question in this court. The Supreme Court has decided in 7 Cranch, 504, that the power in the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. And they held that the Circuit Court did not possess the power to issue the writ in that case, which was a motion to issue a mandamus to a register of a land office in Ohio. I understand this decision as construing the 14th section of the act of 1789 to give the power to issue the writ of mandamus only in aid of a judgment of the Circuit Court.

And this is made clear by reference to the cases of *McClury v. Silliman*, 6 Wheaton, 598; *Fendall v. The United States*, 12 Peters, 617; *Wayman v. Southard*, 10 Wheaton, 22; and *The Board of Commissioners of Knox County v. Aspinwall and others*, 24 Howard, 384. In *McClury v. Silliman*, Justice Johnson, delivering the opinion of the Supreme Court, says: "It is now contended that as the parties to this controversy are competent to sue under the eleventh section, being citizens of different States, this is a case within the provisions of the fourteenth section, and the Circuit Court was vested with the power to issue this writ, under the description of 'a writ not specially provided for by statute,' but 'necessary for the exercise of its jurisdiction.'" This is the ground taken, as I understand, by the counsel in this case. Justice Johnson says: "The fourteenth section of the act under consideration could only have been intended to vest the power now contended for in cases where the jurisdiction already exists, and where it is to be courted or acquired by means of the writ proposed to be sued out." And the Supreme Court in sustaining the writ of mandamus issued by the Circuit Court for the District of Columbia, in the case of *Kendall v. The United States*, did it upon the ground that that court was vested with broader power and jurisdiction in this respect than are vested in the Circuit Courts of the United States in the several States. I am of opinion, therefore, that this objection is not valid.

The second objection urged by the defendant's counsel is, that the bill should have been filed in the corporate name of the "Bal-

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timore and Ohio Railroad Company," and that this is not one of those cases in which a private stockholder has the right to institute proceedings in his own name.

Now the bill alleges "that the said company in its corporate capacity has made no defense, nor taken any steps in denial of the pretensions aforesaid of the said city of Baltimore, although respectfully requested to do so by your orator, which through its counsel addressed to the president and directors of said company the two notes, copies of which are herewith filed, to neither of which has any answer been made; and that your orator has reason to apprehend, and does apprehend and charge, that the said company does not intend to initiate any proceedings in the premises, but means to leave the private stockholders to defend themselves." The failure of the company to reply to the two notes of the complainant's counsel, and to file an answer to this bill, shows clearly that this charge of the bill is true. And inasmuch as the facts of the case show that there are three classes of stockholders in the Baltimore and Ohio Railroad Company whose interests in reference to this controversy are in conflict, there is wisdom in the course pursued by the president and directors of the company. They could not with propriety take sides with either class of stockholders. For this reason, if for none other, the private stockholders should be permitted to file a bill in their own name, to have this controversy between themselves and the other stockholders of the company finally decided, and to obtain such relief in the premises to which they may show themselves entitled.

But I consider this case within the spirit of the decisions made in the two cases referred to in the argument, viz., *Campbell & Voss v. Poultney, Ellicott & Company* and *The Union Bank*, in 6 Gill and Johnson, 102, and *Dodge v. Woolsey*, 18 Howard, 344. Whenever the course pursued by the corporate body would amount to a breach of trust, or be a violation of the chartered rights of the stockholders, and there exists no adequate remedy at law, a court of equity will interfere, and its powers may be put in motion by a single shareholder, though it is usual for him to act for himself and all the other stockholders similarly situated who will come in and contribute to the expense of the suit.

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Much stronger, however, is the claim of this complainant to be permitted to institute these proceedings in its own name, as I have shown that the corporation which represents all its shareholders could not with propriety institute this proceeding.

The third objection is to the jurisdiction of the court. It is contended by the defendant's counsel, that inasmuch as the charter of the Baltimore and Ohio Railroad was confirmed by the legislature of Virginia, said company became a corporation of that State; the complainant, which is also a corporation of Virginia, cannot institute any proceedings against the said railroad company in this court. But this, too, is no longer an open question, the very point having been decided by the Supreme Court in the case of *Marshall v. The Baltimore and Ohio Railroad Company*, 16 Howard, 314. Marshall was a citizen of Virginia, and as such sued the Baltimore and Ohio Railroad Company in this court, and the Supreme Court held that the suit was properly instituted.

Having thus disposed of the objections to the character and form of this bill, and to the nature of the relief sought by it, I now come to the merits of this controversy. The corporation of Baltimore claim that they have the right, as the owner of the stock which has accrued to them by virtue of the extra dividend resolution, to appoint four additional directors in said company. And the counsel for the city claim this by virtue of the 7th section of the original charter of the Baltimore and Ohio Railroad Company. So much of that section as relates to this subject is in the following words: "And be it enacted, that to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October in every year, in the city of Baltimore, by the stockholders of said company, and that the State of Maryland and the city of Baltimore may each appoint one additional director of said company for every twenty-five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting." And that part of the 2d section of said act to which I shall have occasion to refer, is in the following words: "That the capital stock of the Baltimore and Ohio Railroad

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Company shall be three millions of dollars, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the State of Maryland, and five thousand by the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporation or by individuals."

The 11th section of the act is as follows: "That if any of the fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore or the State of Maryland, shall remain unsubscribed until the organization of the said company, or if the shares of the capital stock hereinbefore reserved for the said State or city, or any part of them, shall not be subscribed by the said State or city respectively during the time for which such stock is reserved for them, in either case the president and directors of the said company, or a majority of them, shall have power to open books, and receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell and dispose of such unsubscribed stock for the benefit of the company, for any sum not under its par value," etc.

Under this act the city subscribed for the five thousand shares reserved for her within the time specified, and appointed two directors, and has appointed them annually ever since, as she has never parted with the said stock. The only other subscription the city has ever made to the Baltimore and Ohio Railroad, was a subscription made in 1836, of thirty thousand shares, by virtue of the authority given to the city by the act of Assembly of 1835, ch. 127. The 1st section authorized the city to subscribe to the capital stock of the Baltimore and Ohio Railroad Company any amount not exceeding three millions of dollars over and above the sums heretofore subscribed by them. And the 4th section of said act authorized the city to appoint an additional director for every five thousand shares of the stock of the said company for which the city might subscribe in pursuance of that act, and which shall be owned by the city at the time of the annual election, with this proviso at the end of said section: "Provided that nothing herein contained shall be taken to impair the right which

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the city has to have two directors of the said company for the five thousand shares already held by it, whether it should make the subscription hereby authorized or not, nor in any event to have more than twelve directors of said company."

Now it is contended that the authority of the city to appoint a director for every two thousand five hundred shares of stock owned by said city, at any election, is not to be limited to the five thousand shares which the city was authorized to subscribe for by the second section of said original act, but was an authority to appoint an additional director for any two thousand five hundred shares which the said city might subscribe for or purchase at any future time. Now this construction would be plausible if the city possessed the authority, in 1826, to subscribe for this or any other railroad stock, independent of any special grant of power or authority from the legislature. The counsel for the city contend that it had such power by virtue of the general authority contained in the first section of its charter (act of 1796, ch. 68), "*to purchase and hold real, personal, and mixed property, and to dispose of the same for the benefit of the city.*" Now it is admitted that if you cannot find this power for the city in its charter, it does not exist. For corporations (and in this aspect there is no difference between municipal and other corporations) have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted. As authorities upon this point, if any are wanted to sustain so clear a proposition, I refer to the following cases: *Perin v. Chesapeake and Delaware Canal Company*, 9 Howard, 184; *The Mayor and City Council of Baltimore v. Hughes*, 1 Gill and Johnson, 481; *Cohen v. State of Virginia*, 6 Wheaton, 264; *New London v. Brainard and others*, 22 Connecticut, 555; *Beatty v. Knowler*, 4 Peters, 152; *The City of Lafayette v. Core*, 5 Indiana, 38; *Hodges v. The City of Buffalo*, 2 Denis, 112; *Kane v. Mayor and City Council of Baltimore*, 15 Maryland, 247. The case in 5 Indiana was very similar to this case. The city of Lafayette had undertaken to issue bonds to aid in the construction of a railroad, relying upon the authority given to it in its charter to create a debt to a limited amount, but the court decided that the authority to create a debt was limited to a debt to carry out the objects specified in the charter.

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I hold it to be very clear, therefore, that the authority to the city in the 1st section of its charter to purchase real, personal, and mixed property, is limited to the purchase of such as may be necessary for the purposes of the corporation, such as houses for its public offices to be held in, and furniture to fit them up, or to such as may be necessary to enable the city to execute the powers conferred upon the said corporation by the 8th section of said act of 1796. And I am sustained in this view by the acts of the city and the legislature of this State from 1826 to the present time. The city has never subscribed to any work of internal improvement without seeking a special authority from the legislature of the State for that purpose. This is a legislative interpretation of the city charter for a period of sixty-six years. To some of these laws I will now refer.

The act of 1831, ch. 214, section 2, gave to the city the authority to aid in the construction of any useful public work authorized by any law of the State to the extent of \$1,000,000.

Act of 1835, ch. 395, gave authority to the city to subscribe for such part of the capital stock of the Maryland Canal Company, and the Baltimore and Ohio Railroad Company, as shall not be subscribed by individuals.

Act of 1853, ch. 269, gave authority to the city to aid in the construction of the Pittsburg and Connellsville Railroad.

Act of 1854, ch. 260, section 4, authorized the city to subscribe to the Susquehanna Railroad Company, and the acts of 1826 and 1835, to which I have referred in a former part of this opinion.

The city having then no power, in 1826, to subscribe for shares in the Baltimore and Ohio Railroad Company but what that act in its 2d section gave, must not the authority given to the city in the 7th section to appoint one director for each two thousand five hundred shares by it owned, be limited to appoint directors for that five thousand shares, and for none other? They could subscribe for no further shares without a new grant of power from the legislature; and we see that when the legislature made a new grant of power in 1835, they fixed a new basis of representation in the board of directors, and authorized the city to appoint an additional director for each five thousand shares of stock

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by the city subscribed under the act. Now the *proviso of the 4th section* of that act has been much relied upon to warrant a different construction of the act of 1826. I remark, in the first place, that the act of 1835 is a special act to give authority to the city, and is not a supplement to the charter of the railroad; and although by the railroad receiving the city's subscription, they were bound to admit the six directors for whose appointment that act provided, yet that act no further bound the railroad company, or altered in any other manner the chartered rights of the railroad. Besides, the office of a proviso is almost universally to limit, and not to enlarge power.

The power now claimed for the city must be found, if it exists at all, in the 7th section of the act of 1826. It will be observed that it was optional with the city whether it would subscribe for any amount of stock under that act, and the legislature contemplated a contingency of that kind when, in the 11th section, it provided for a sale, etc., of such part of the stock reserved for the city as it might decline to subscribe for within the time specified. It was the same contingency, or a sale of her stock after subscription by the city, that the legislature evidently had in view when they used the word "*owned*" in the 7th section. I am therefore of opinion that the city has no legal authority to appoint these four additional directors, and if the act of 1835 had not contained the authority to appoint the six directors as provided in the 4th section, no such right would have existed in the city. This extra dividend stock has been issued by the president and directors of the Baltimore and Ohio Railroad Company to fund the certificates of indebtedness which had been given to the stockholders of said company for net profits borrowed from them from time to time, and was the exercise of a power clearly granted by the 13th section of the charter. It is, then, so many new shares added to the capital stock of the company, with only such privileges as belonged to the original capital stock, and not having the special privilege or restriction in reference to that part belonging to the State and city which the legislature thought proper to grant and impose in the 7th section of the original charter. I will therefore grant the injunction for which the complainant has prayed in his bill.

United States Circuit Court, District of Maryland, March, 1869.

S. M. SHOEMAKER v. THE NATIONAL MECHANICS' BANK.
SAME v. THE NATIONAL UNION BANK.

Where the answer to a bill praying an injunction denies all the material allegations of the bill, a preliminary injunction will be refused.

A national bank has the right to make loans on the negotiable notes of persons or firms secured by stock and bonds of marketable value as collateral; and on a bill praying an injunction against such a practice, the prayer will be refused.

IN equity.

GILES, J.—This bill is not filed to have the charter of defendant as a national bank declared void for the causes mentioned in the 53d section of the act, to provide a national currency, etc., passed June 3d, 1864. This would not be the appropriate proceeding for such a purpose. That could only be accomplished by a suit instituted by the Comptroller of the Currency. But this is a bill filed by one of the stockholders in the National Mechanics' Bank of this city, to restrain the president and directors of the said bank from pursuing a course which, he alleges, is a violation of the requirements of their charter under the said act, and by which they are wasting the assets of said bank, to the loss and injury of the complainant, and its other stockholders. The motion for this injunction has been heard on bill and answer. The principle now almost universally recognized, is, that where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse the writ of injunction.

Such being the object of the bill, if its allegations were admitted by the answer, or proved on final hearing to the satisfaction of the court, it would be its duty to restrain the officers of the said bank from any further misapplication of its funds, which might result from any act not warranted by its charter, or which would amount to a breach of trust.

This is clear, from the decision of the Supreme Court, in the case of *Dodge v. Woolsey*, 18 Howard, 341. In that case the

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court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust."

It becomes necessary, therefore, to carefully examine the bill and answer. The bill, that we may learn what are the facts which it sets forth, and on which it claims the equitable interference of the court, and the answer, that we may see if these facts are admitted or denied. Now there are many things stated in the bill and replied to in the answer, with which we have nothing to do on this motion. Whether the loan to Bayne, by the defendant, was made under such circumstances as will render the officers who made it responsible to the stockholders for any loss the bank may incur therefrom, can only be answered when this case comes before the court on final hearing. And it may be doubtful whether such question could even be decided on the pleadings in this case; it would seem to require a bill to be filed against the officers who made the loan individually. This is a bill against the bank in its corporate capacity. The allegations on which the preliminary injunction is asked are the following: "That in violation of said express prohibition, and in violation of the trust as aforesaid confided to its officers, the said bank and its officers lent to Bayne and Bayne & Co., of the funds or capital of said bank, from time to time, divers sums of money, in the whole largely exceeding one-tenth of the capital stock of said bank actually paid in, and that for many months the amount of money so loaned exceeded \$300,000." And it is further alleged, that said loans were made upon collateral security of stock, etc., some of which were spurious, and that among these were 1250 shares purporting to be the stock of the Washington, Georgetown and Alexandria Railroad Company, a corporation

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which the bill charged never had any legal existence, etc. And that said bank is joining in the prosecution of, or has been made party to certain suits, touching or concerning the interests of said railroad company.

It also charges that the said defendant, by its officers and agents, hath offered to pay into the Circuit Court of the United States for the Eastern District of Virginia, the sum of \$20,000 of the funds of said bank in a cause therein pending, in which the said bank has no interest whatever, and to which it is not a party, and did actually pay in said cause \$200 fees to commissioners, and did actually pay \$100 to trustees of Bayne & Co. upon some illegal and unauthorized agreement as to said securities taken by them from Bayne, and that they are negotiating for and offering to expend the money and funds of said bank in and about the repairs and reconstruction of the bridge of the said railroad company across the Potomac River, in which said bank has no sort of interest, and cannot legally have any; said bridge, it is estimated, will cost over \$100,000 to repair. And it concludes with a prayer that the said bank, its officers, agents, and attorneys, may be restrained from further prosecuting or defending any one or more of said suits at the cost or charge, or in the name of said bank.

The answer admits that Bayne & Co. did pledge with its cashier, early in the month of February, 1866, as collateral security for its money loaned and advanced to said firm, 1250 shares of the capital stock of said railroad company of the par value of \$100 each, and that the trustees of Bayne & Co. did, subsequently, for \$100, assign all the equity of redemption to said stock to the cashier of this defendant.

It also admits that, as a holder of stock of the said railroad company, it did agree, with certain stockholders of said company, to advance a portion of the sum of \$20,000, which was offered to be paid into the Circuit Court of the United States for the Eastern District of Virginia, in a cause in which the said railroad company and others were defendants, and Adams Express Company was complainant, to abide the decision of said cause, with the purpose of preventing the said railroad from passing into the hands of a receiver, to be appointed by the said court;

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but said offer was refused by said court, and no money was paid on account thereof, and that this defendant was to have been adequately secured if said money had been actually advanced, and that it did advance about \$40, part of defendant's commissioners' fees in said cause. And this defendant denies that it is negotiating or offering to expend its money or funds in the repair and reconstruction of the railroad bridge across the Potomac. It also denies that it or any other of its officers, at the time stock was issued in the name of its cashier, or previous thereto, had any knowledge or good reason to believe that the said railroad company had no legal existence, or that the certificates were fraudulently issued, but that as late as May, 1866, the stock of the said railroad company was held and esteemed as a valuable stock at par, or over par, and that as late as the middle of May, 1866, large loans were effected upon the pledge of its certificates of stock at or about par.

Now the only fact admitted in the answer pertinent to the present inquiry is, that the said defendant did receive from Bayne & Co. a pledge of the railroad stock as *collateral security* for loans made to said firm, and that said bank is now, in company with other stockholders of said railroad, engaged in suits, upon whose final decision depend the very existence of said road and the value of its stock. Will these facts warrant the granting of a preliminary injunction? Now the granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. It is one of the highest powers confided to a court of equity, and its exercise ought, therefore, to be guarded with extreme caution, and the remedy applied only in very clear cases.

As to the first charge in this bill against the defendant, in reference to the amount loaned to Bayne & Co., in violation of the 29th section of the act of Congress, passed June 3d, 1864 (under which act the defendant became a national bank), I would only say that the loan made under such circumstances is not void; it can be enforced as any other loan made by the bank. This, I apprehend, is clear from the fact that Section 29 provides no penalty for its violation, and Section 53 of the same act, for all violations of the provisions of the same act, provides two penalties; first, a forfeiture of the privileges and franchises of

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the said bank derived from the said act, to be adjudged in a suit brought for that purpose in the Federal court; and second, a personal liability by every officer of a bank who participated in or assented to such violation for all damages which the bank may sustain in consequence thereof. Indeed, this clause was not pressed in the very able argument of the learned counsel who closed on behalf of complainant. The point so forcibly made by him was that the defendant was prohibited by its charter from making this loan on a pledge of stock, and if so, no title to this stock passed from Bayne & Co. to the defendant. Clearly if the defendant's title to this stock depended on a purchase as an investment by it, such purchase would be beyond its corporate powers, and void. The learned counsel, however, contended that by the true construction of the eighth section, this loan was not embraced among the enumerated powers of the bank, "that no loans are valid except those on personal security." The language of that section is, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, by obtaining, issuing, and circulating notes according to the provisions of this act."

I understand that the language I have quoted contains five distinct grants of power, and that no one grant is a limitation on any other. By the first, the bank is authorized to discount promissory notes, drafts, bills of exchange, and other evidences of debt; second, to receive deposits; third, to buy and sell exchange, coin, and bullion; fourth, to loan money on personal property (I understand by this, or any other personal security than is mentioned in the first grant); fifth, to obtain, issue, and circulate the national currency. If I am right in this construction, then the loan to Bayne & Co. was authorized by the said section, as the charge in the bill is that the loans to Bayne & Co. were made upon paper evidences of debt upon bonds, notes, checks, etc., and upon collateral security of stocks, etc., and the answer states that the stock in said railroad was pledged with its

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cashier as collateral security for its money loaned. If collateral security, then collateral to the personal responsibility of Bayne & Co. on the notes, checks, and bills of exchange cashed for said firm by this defendant; collateral security in bank phraseology means some security additional to the personal obligation of the borrower. But admit that this construction is doubtful, it is not so doubtful as that construction which would limit the banks to the power of loaning money only on personal security, and deny to them the power of taking a pledge of stock as collateral security for notes or bills of exchange cashed by them. As I said before, a court of equity should never grant a preliminary injunction in a doubtful case. However, I have no doubt that the taking this collateral security from Bayne & Co. was a valid transaction, and whether it will ever avail the defendant anything will depend upon the decision of those tribunals before whom is now pending the question of the validity of the charter of the said railroad company and the character of its stock. The preliminary injunction asked for in this case is refused. For authorities to sustain the view I have taken of the law governing this case, I refer to the following cases: *Bates & Hines v. The Bank of the State of Alabama*, 2 Alabama Rep., 462; *Magruder and others v. The State Bank*, 8 Arkansas, 9; *Bank of Middleburg v. Bingham*, 33 Vermont, 636; *Farmers' Bank v. Buechard*, 33 Vermont, 348; and *Rock River Bank v. Sherwood*, 10 Wisconsin, 230.

Circuit Court of the United States for the Eastern District of Virginia, May, 1877.

KINNEY v. ALLEN & Co.*

The numerical symbol $\frac{1}{2}$, printed in large, bold, red characters, in a certain form and style, had been used since 1873 by the complainant as one of his trade-marks on the packages and boxes of certain classes of cigarettes manufactured by him, and was registered in the United States Patent

* This report of this case is derived from The American Law Times Reports, Vol. IV, No. 6, p. 258.

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Office in June, 1875. This symbol was originally employed to indicate the idea that the cigarettes were composed of two kinds of tobacco in the proportion of half and half; but except so far as it indicates this idea, which it does not really *express*, it is a merely arbitrary device. On a bill brought to enjoin against another's use of this symbol: *Held*, that the complainant had not a right to the exclusive use of the numerical character $\frac{1}{2}$, written in any ordinary manner; but that he had a right to the exclusive use of it in the particular form, size, color, and style in which he had used and registered it.

IN equity.

This was a suit to restrain the infringement of a trade-mark. The trade-mark consisted of a representation of one-half, and had been duly registered in the Patent Office of the United States, pursuant to the Revised Statutes. The following is a fac-simile of it as shown by the proofs:

1/2

Other facts are set forth in the opinion.

Cox & Cox, for complainant.

The defences relied upon are as follows: (1.) That the symbol is not a trade-mark because it is composed of numerals. (2.) That the symbol is not a trade-mark because it is descriptive. (3.) That, even if the symbol is a trade-mark, it has not been infringed, because the respondent's labels as wholes are entirely unlike complainant's.

1. A numeral or numerals may be used for a trade-mark.

That a word or words may be employed as a trade-mark has long been settled law. It is submitted that it necessarily follows that a numeral or numerals may be. A word is the expression of a concept or idea. The word "ten" and the numeral 10 are essentially the same as vehicles of a concept. They are unlike only as "idem" and "same" are unlike. "1805 Brandy" would not be sustained for the same reason that "Eighteen Hundred and Five Brandy" would not; because both would necessarily express a fact concerning the date of production of the article. But "Five Fifty-five Brandy" would be good in law, and for the same reason "555 Brandy" would, it is submitted, be open to no objection. And, it may be added, if a manufacturer used "555" for one quality, "666" for another, and "777"

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for a third, they would all be equally valid as arbitrary expressions of an idea. As far as any principle is involved, therefore, there is no difference between numerals and words.

The adjudged cases are to the effect that numerals may be employed as trade-marks. *Gillott v. Esterbrook*, 47 Barb., 455; *Dawes & Fanning Case*, Dec. Com. Pat., 1872.

2. The symbol as used by the complainant is not descriptive.

The evidence shows that it has been used upon cigarettes made of two and three kinds of tobacco. Its office is the same as that of any other brand or trade-mark. The complainant manufactures a "St. James," which is made of one kind or mixture of tobacco; a "Caporal," which is made of another kind or mixture; an "Alexis," which is made of another kind or mixture, and so on. One of the incidental qualities of each of these different designations is that it signifies a particular kind of tobacco or mixture. "St. James" has been applied to a cigarette of perique; "Caporal" to a cigarette of perique and Virginia; and "Alexis" to a cigarette of other tobaccos. Because these terms have been so applied, and have, when used on cigarettes of Kinney's manufacture, a distinct and indisputable reference to the ingredients of which the cigarettes are composed, they are none the less valid trade-marks. Because "St. James" has been invariably and continuously used on perique cigarettes by Kinney, and, as used by him, is synonymous with perique, it by no means follows that others may use "St. James" upon perique cigarettes. In brief, "St. James" does not mean simply perique cigarettes, but *perique cigarettes made by Kinney*, and any use of the word "St. James" in connection with cigarettes is a representation that they are (1) made of perique, and (2) made by Kinney.

If, then, it be conceded that the symbol of one-half, as used by the complainant, has been invariably applied to cigarettes made of mixed tobacco, it is not a sequitur that the respondents have a right to use it. In contemplation of law, upon such an assumption, the particular symbol means (1) cigarettes made of mixed tobacco, and (2) cigarettes made by Kinney.

It is confidently submitted, therefore, that any defence based

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on the circumstances that the mark may have been used only upon cigarettes made of mixed tobacco, is without force.

The material inquiry then becomes, Is the red symbol $\frac{1}{2}$, arranged as shown, descriptive?

The adjudged cases establish that a word is not a trade-mark, on account of its being descriptive, only when it is such by reason of its *etymological relation to the article in connection with which it is employed*. To be descriptive it must point directly to some quality or property of the goods. It must be an intelligible statement of a fact. It must communicate from its etymological nature, not by association or inferentially, some truth concerning the goods. Either this, or it must have come to be descriptive by public use as a term of art or trade. Thus "Navy" as applied to tobacco, and "Pig" as applied to iron, are descriptive terms by reason of common use. Both were once valid trade-marks, and yet both were originally used just as the symbol $\frac{1}{2}$ is alleged to have been used by the complainant. The originator of pig iron made an article of particular properties. The term was arbitrarily applied, but fell into general use, and so became descriptive. Perhaps a century hence a red one-half will be equally descriptive; but to-day it is just where the term "Pig" was when it was first used by its originator, and pointed to his production of iron.

The symbol, as used by the complainant, has *in itself no meaning whatever*.

What does it mean to the court when it is observed on a package of cigarettes? It is absolutely meaningless. The sole conception is that it is a symbol denoting one-half. Nothing beyond this is communicated to the mind. Everything else is conjecture. It may relate to price, or to ingredients, or to size, or to quality. It may mean that half the cigarettes are of one kind, and half of another, or that half-rate tobacco is used. It may mean any or all of these, and meaning any or all, it is not descriptive.

It signifies a fact only at most, when there is one-half of something, but what that something may be it does not and cannot denote. As a consequence, it is not in any right sense descriptive.

It is not a synonym of "mixed," and can only become such

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by common use. It may mean mixed on Kinney's goods, just as "St. James" means perique, but it does not, *apart from Kinney's use of it*, mean anything. It is, in brief, *an arbitrary sign or mark used to denote a particular class of goods made by a particular person. It is a trade-mark.*

3. But it is urged that even if the symbol is a trade-mark, it has not been infringed, because the respondents' labels as wholes are entirely unlike complainant's. There is no contention on the part of the complainant, that the labels as wholes are so nearly similar as to be likely to be mistaken. The case is purely a *trade-mark case*, the infringement consisting in the application of that which complainant insists is used to distinguish his goods, as a specific mark or symbol.

In respect of infringement, it is said by the Supreme Court of the United States, in the case *The Canal Company v. Clark*, 13 Wallace, 311: "The first appropriator of a name or device, pointing to his ownership, or which by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the articles, is injured when another adopts the same mark or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former."

The language of the statute is: "Any person who shall reproduce, counterfeit, copy, or imitate any recorded trade-mark, and AFFIX THE SAME to goods of substantially the same descriptive properties, shall be liable to an action," etc.

There can be no doubt, therefore, that the question of whether the labels are generally similar is immaterial.

The distinctions of the present case are unquestionably nice, but it is thought that a critical examination must necessarily lead to the conclusion that the law is with the complainant.

John O. Steger, for respondents.

The complainant testifies that he has used the figures " $\frac{1}{2}$ " on two brands of his cigarettes, the "St. James" and the "Caporal," as early as June, 1871, and the fact is not denied. He further testifies that he so used them as a *trade-mark*. This is denied, and is clearly disproved by the evidence.

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The complainant commenced using the Turkish cap and the " $\frac{1}{2}$ " on the same day for a particular purpose, and that was, to mark a particular kind of goods. That the "St. James" and the "St. James $\frac{1}{2}$ " were commenced about the same time, but the "St. James" was the first. The "St. James" cigarettes were made of perique tobacco, and the "St. James $\frac{1}{2}$ " were made of *one-half* perique, and one-half Turkish. Upon each of these brands the complainant affixed a label containing the words "St. James," and his name, and also, his unquestioned trade-mark, the Turkish cap. If the " $\frac{1}{2}$ " was designed by him to designate *the origin or ownership* of the article, what reason was there for affixing it upon a label which already had two trade-marks upon it and also his own name? On the other hand, if he designed to make another kind of cigarette, composed one-half of perique and the other half of some other kind of tobacco, it would be appropriate, convenient, and economical to use the "St. James" label, and distinguish the difference in the cigarettes by the figures " $\frac{1}{2}$," meaning thereby that the cigarettes thus marked contained only $\frac{1}{2}$ perique tobacco. The "Caporal" cigarettes were made of Turkish and Virginia tobacco; the "Caporal $\frac{1}{2}$ " were made of Turkish, Virginia, and perique, in what proportions we are not informed, but it is fair to presume that they contained $\frac{1}{2}$ of Turkish and Virginia, and $\frac{1}{2}$ of perique, as "Caporal" was of Turkish and Virginia. Every box and package of cigarettes made by the complainant informed the trade that the Turkish cap was his trade-mark, and his showcards and price lists, which were distributed to dealers, showed the composition of his various brands of cigarettes, and in some instances informed them that the "cap" was his trade-mark, and he never in any way whatever, informed the trade that the " $\frac{1}{2}$ " was claimed by him as a trade-mark, although he had already sued several persons for violating it. And it was the understanding of the trade that he affixed the $\frac{1}{2}$ on the St. James and Caporal simply to designate that the cigarettes thus marked *contained only one-half of the same tobacco* as the cigarettes marked "St. James" and "Caporal." The complainant never used the $\frac{1}{2}$ except upon cigarettes made of *mixed tobaccos*. He made other cigarettes of mixed tobaccos, for which he had

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different names and different labels, upon which he did not put the $\frac{1}{2}$, for the simple reason that it was not necessary to do so to distinguish them. But when he used the *same labels* for different kinds of cigarettes it was necessary to distinguish them.

The defendant did not originally intend to use the " $\frac{1}{2}$ " as a trade-mark, but only to distinguish one brand of "St. James" from another, and one brand of "Caporal" from another. If he did, how can it be explained that although the $\frac{1}{2}$ was imitated and used by other manufacturers for four years past, he did not register it sooner or take any steps to inform the trade that it was his trade-mark, as he did with regard to the Turkish cap and his other trade-marks? Nor will it avail him to urge, that on the 8th of June, 1875, he certainly did avow that intention, and from that time he is entitled to it as a trade-mark. For at that time, according to his own deposition, it was used by other manufacturers to distinguish their various brands of cigarettes, whom he had sued or was then suing for its infringement, and it had become known to the trade as a mark indicating the *composition* or kind of cigarette, and not as indicating *origin* or *ownership*. Even if the figures $\frac{1}{2}$ could be exclusively appropriated as a trade-mark, the complainant has not so used them, and cannot now claim them as such.

In the leading case of *Amoskeag Manufacturing Company v. Spear*, 2 Sanf. (S. C.), 599, it was held "that no one has an exclusive right to the use of any words, letters, figures, or symbols, which have no relation to *origin* or *ownership* of the goods, but are only meant to indicate their name or quality. No one can appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." This case has been recognized and followed in numerous cases ever since the decision was rendered in 1849. It was expressly approved in 13 Wallace, 311; *Burko v. Cassin*, 45 Cal., 467; *Town v. Stetson*, 5 Abb. Pr., N. S., 218; *Stokes v. Landgraff*, 17 Barb., 608; *Caswell v. Davis*, 58 N. Y. Rep., 223; *Taylor v. Gillies*, 59 N. Y. Rep., 331; *Wolfe v. Goulard*, 18 How. Pr. Rep., 64; *Choynski v. Cohen*, 39 Cal., 501; *Falkenburg v. Lucy*, 35 Cal., 52; *Canal Co. v. Clark*, 13 Wallace, 311; *Glen*

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Hall Co. v. Hall, 6 Lansing N. Y., 158; *Corwin v. Daly*, 7 Bosworth N. Y., 158; *Boardman v. Mer. Brit. Co.*, 35 Conn. R., 402; *Gillott v. Esterbrook*, 47 Barb., 455. The bill should be dismissed with costs.

The opinion of the court was delivered by

HUGHES, J.—The complainant is a manufacturer in New York of cigarettes of several varieties, which are in very popular use. On certain classes of the packages and boxes in which he makes them up for market he places, amongst other trade-marks, an Eastern fez, surrounded by rays of light; and also the numerical symbol $\frac{1}{2}$, printed in bold characters, in red color, with the bar between the two figures oblique and nearly upright; with the figure 1 elevated on the left; with the figure 2 depressed on the right; the symbol as a whole being of such size that the circumference of a circle having a radius of five-eighths of an inch will just include all of its points. This character of $\frac{1}{2}$ as just described has been used by the complainant on certain of his cigarettes since 1873, and he applied for its registration in the Patent Office of the United States in May, 1875.

Shortly before this last-named date, that is to say, in April, 1875, the respondents began to manufacture cigarettes in Richmond similar to those of the complainant, and to put some classes of them up for market in packages and boxes similar to those used by the complainant, and to stamp some of the boxes and packages, amongst other devices, with this same numerical character $\frac{1}{2}$ in broad, scarlet, red color, with the dividing bar oblique and nearly upright, and of size identical with the same character as used by the complainant.

The latter complains that this is an infringement of his right to the exclusive use of this trade-mark, and files his bill praying for a perpetual injunction forbidding the use of it by the respondents.

It would seem that the original idea of the complainant in using this character $\frac{1}{2}$ on certain of his wares, was to indicate that the cigarettes stamped with it were made up of two kinds of tobacco, in the proportion of half-and-half. The numerical character does not *express* such an idea; it is not the term which a

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person accustomed to the use of accurate language would employ for the purpose of expressing it; but yet it must be admitted that it does in some sort *indicate* the idea, and is not an absolutely arbitrary symbol. It is only because of the fact that the character does *indicate* the idea of half-and-half, but does not *express* it, that any confusion attends this case. If the use by the complainant of the numerical character $\frac{1}{2}$ was absolutely arbitrary, there could be no question of his exclusive right to use it stamped in any form upon his goods. But where, on the other hand, a character or word is the one in general use for describing the quality or kind of goods on which it is placed, the books are full of authorities showing that such character or word ordinarily used cannot be appropriated by any one manufacturer, and that the most he can acquire by long usage, or by statutory registration, is the right of using the character or word printed or painted in some special form not in ordinary use. The cases reported on this head are so numerous and emphatic that it is needless to cite them.

There are, therefore, but two questions arising in the present case as to this numerical character $\frac{1}{2}$.

1. The first is, its use by the complainant being in a critical sense merely arbitrary, as only *indicating* but not *expressing* the idea of half-and-half, but not absolutely arbitrary in a popular sense,—whether or not complainant has a right to an injunction prohibiting the use by others of the character *in any form* on wares similar to his own. On the general principle that exclusive privilege, in prejudice of general right, ought not to be upheld in cases of nicety and doubt, I think it most proper not to grant a general injunction.

2. The next question is, whether the complainant has a right to the exclusive use of this trade-mark *in the form, size, color, and style*, in which he has used it upon his wares since 1873, and in which he registered it in 1875. Upon the authority of cases numerous reported, and upon principles well established, I decide that he has such a right, and will so decree, and will insert in the decree an imprint of the character $\frac{1}{2}$ in the form, size, color, and style, in which an exclusive use upon his cigarettes is affirmed to the complainant.

United States Circuit Court, District of Maryland.

THE ALLEGHANY FERTILIZER COMPANY v. WOODSIDE,
GRIFFITH & HOBLITZELL.

The word "*Eureka*," first used by complainants in a compounded fertilizer which they call the "Eureka Ammoniated Bone Superphosphate of Lime," and have used for several years, is a trade-mark, in the exclusive use of which they have the right to be protected by the courts.

IN equity.

The complainants, a Boston company, are the manufacturers of a fertilizer to which they have given the name of "Eureka Ammoniated Bone Superphosphate of Lime." The defendants manufacture a fertilizer which they call the "Baltimore 'Eureka' Ammoniated Bone Superphosphate of Lime." At a former hearing the court had refused the complainants' application for a preliminary injunction, because the defendants, in their answer, denied that the appropriation of the name as a trade-mark was original with the complainants. The testimony, however, proved conclusively that the name originated with the complainants in 1865, and that its use by them had been continuous and exclusive to the present time, and under that name the fertilizer manufactured by them had become widely known.

GILES, J.—The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. Upon this ground, in a previous case, the court had refused protection to the name "Balm of a Thousand Flowers" as a trade-mark, because it had been proved that it was a common designation among perfumers, having its correlative in various European languages, *e. g.*, the French "*mille fleurs*," Italian "*milli fiori*," etc. But a purely arbitrary or fanciful appellation, for the first time used

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to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark. Such was the Greek word "Eureka," applied to a fertilizer.

The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such so soon as the article becomes known and distinguishable by that mark. But the words "ammoniated bone superphosphate of lime" being the proper name of an article which anybody may make or sell, by themselves could never constitute a trade-mark. "Eureka" was, therefore, for the purpose, and in the connection in which it was used, the complainants' trade-mark. By it the fertilizer manufactured by them became known, was bought and sold, and acquired its reputation. Persons at a distance desiring to order it wrote to their merchants, "Send me ten, twenty, or thirty tons of 'Eureka.'" Even in the trade it was far better known by this name, as the testimony showed, than by the name of the manufacturer or place of manufacture. The name was, therefore, valuable to the complainants, and they were entitled to be protected in the enjoyment of it as their trade-mark. To deny this protection would be a reproach to the law or to a court of equity. If it was not valuable, why did the defendants seek to appropriate it, when all the languages of the earth were open to them from which to make their selection? If it had no value in their eyes, why did they take the advice of counsel as to their right to use it? This very conduct of the defendants proved that, in their estimation, it was a thing of value to the complainants.

But it was argued the name adopted by the complainants did not sufficiently indicate "origin and ownership" to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainants' manufacture quite as effectually as names ever serve to distinguish things. The doctrine contended for would invalidate ninety-nine in a hundred of the trade-marks which had been upheld by the courts. It was also said that no violation of the complainants' rights had been attempted by the defendants, inasmuch as they did not profess to sell their fertilizer

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as the manufacture of the complainants, but the contrary, and their advertisements in the newspapers had been read in proof of this fact. This was also illusory. They had attempted, by the appropriation of the complainants' trade-mark, to profit by the reputation their fertilizer enjoyed in the market, with the value of which they were well acquainted, having been for several years the complainants' agents in this city. Besides, the fertilizer was widely sold in different portions of the South, where the defendants' advertisements might never be seen. It was in evidence that persons had been deceived, that a farmer in Virginia, wishing to buy the article he had used and tested for several years, which was the complainants', had bought the defendants' instead, misled by the name. This was all wrong, and whatever the intentions of the defendants might be, it was a fraud in law, which it is the duty of this court to prevent. Nor was it necessary that the defendants should have copied the entire trade-mark of the complainants, or that the verbal or physical resemblance of the two marks, placed side by side, should be complete. They had taken the essential part of the complainants' mark when they took the word "Eureka."

Judge Giles referred to various authorities in support of the views he had expressed. He read with particular approbation the opinion of Lord Cranworth in the case of *Leixo v. Provezende*, reported in 1 Eng. Chancery Appeals, as containing the clearest exposition of the law of trade-marks he had found; also a recent decision of the Supreme Court of Missouri, reported in the July number of the *American Law Register* for 1869, in which the name "Charter Oak," as applied to a stove, had been upheld as a trade-mark, and which, the learned judge said, fully covered the ground of the present case. The conclusion of the whole matter, in his opinion, was that, when the right of a manufacturer or dealer to a particular trade-mark had, by priority of appropriation, been once established, no rival manufacturer was at liberty to use the same mark for the same purpose, even in connection with his own name and place of manufacture. He would, therefore, sign a decree in the present case perpetually enjoining the defendants from any use of the complainants' mark.

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Counsel for complainants were S. T. Wallis and T. W. Hall, Jr., Esqs.; for defendants, J. H. B. Latrobe and J. A. Preston, Esqs.

*United States Circuit Court, District of Maryland, at Baltimore,
March, 1863.*

MARY BARNEY v. THE MAYOR AND CITY OF BALTIMORE.

Under the clause of the Judiciary Act of 1789, giving United States Circuit Courts jurisdiction of certain causes between a citizen of the State where the suit is brought and a citizen of another State, citizenship of one of the suitors in the District of Columbia does not give jurisdiction.

Conveyances of the interests of non-residents made merely for the purpose of giving these courts jurisdiction, do not suffice that purpose.

Before complainant's bill for a partition of property can be entertained by a court, his title must be clear to the portion to be received from the partition.

Where an owner of land exhibits a map of it in which a street is defined, though not yet opened, and sells building lots with front or rear on the street, and makes no express reservation, he dedicates the street for public use; and, if in a city, surrenders it for all public purposes, and if the street runs to or binds on a river or bay, surrenders it for use as a wharf where vessels may load and unload; but yet the fee simple will not pass to the city.

In equity.

GILES, J.—This cause is submitted for final decree on bill, answer, evidence, and admissions filed. The counsel for the respective parties have been fully heard, and in the very learned and able arguments that have been made, almost every case has been cited that could in any way sustain the positions and views of the respective parties. The original bill in this cause was filed on the 26th September, 1848. Various changes have taken place since, in reference to the parties, by death or otherwise, which it will not be necessary to notice; as on the 28th of June, 1860, this court passed the following order: "that the complainant have leave to file an amended and supplemental bill and bill of reviver,

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as prayed for by her petitions filed 5th July, 1859, and 16th June, 1860; said bill to be filed on or before the first Monday of July next; all questions touching the jurisdiction of this court, in this court, in the said case, either on the original bill or on the bill which may be filed under this order, and also all questions as to the complainant's right of relief in this proceeding, are reserved under the final hearing."

The amended bill under this order was filed on the 30th of June, 1860, and the answer of the mayor and city council of Baltimore thereto, on the 21st July, 1860; and it is on the issues which this amended bill and answer present, that this cause has been argued, and upon which I am now to decide. The bill alleges in substance, that the complainant, as one of the heirs of Judge Samuel Chase, is tenant in common with the other defendants, his grandchildren, and with the mayor and city council of Baltimore, grantees of Samuel and Thomas Chase, sons of Judge Chase, of the fee in the bed of West Falls Avenue (formerly called Liffy Street) and of the City Block, and as such, that she is entitled to a share of the wharfage collected by the city on the west side of Jones's Falls and on the City Block, and to one-sixth part of the City Block. And the bill prays for an account and for a partition between the parties entitled.

The bill also states that three of the defendants, to wit, William G. Ridgely, Ann Ridgely, and Matilda Ridgely are residents of the District of Columbia; that since the filing of the original bill in this case, to wit, on the 8th day of June, 1858, they had conveyed all their interest in the property in question to their brother, Samuel Chase Ridgely; that said Samuel Chase Ridgely has since died, and by his last will and testament devised the said property so conveyed to him by his said brother and sisters back to them. All of the defendants, except the mayor and city council of Baltimore, have filed a joint answer admitting the facts stated in the said bill of complaint. The mayor and city council of Baltimore file a plea, demurrer, and answer, in which they allege that the conveyance made by the said William G. Ridgely and others to Samuel Chase Ridgely was without consideration, colorable and fictitious, and was executed with the intent to give jurisdiction to this court. And

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that the said grantors in said deed have no legal standing as devisees of Samuel Chase Ridgely to be parties to this bill.

There are also filed in the cause two papers, stating in detail the several facts which have been admitted by the parties. These relate principally to the relationship of the said parties to Judge Chase, and contain the agreement, that either party may offer in evidence the record of the ejectment suit brought by the complainant for this property against the mayor and city council of Baltimore in Baltimore County Court; and that the plats, deeds, and evidences may be read from the record in said case, as evidence in the trial of this cause. The only parts of these admissions which it becomes necessary for me to notice particularly, are the following :

“It is admitted in this case, that the deed of the 8th of June, 1858, to Samuel Chase Ridgely from William G. Ridgely and others, was made without valuable consideration, and to enable the court to dispose of the case, as if the grantors in the deed had no interest in the matter in question in the cause; it being further understood, that on request of the grantors, the property conveyed by that deed should be passed to the grantors.”

Also, “the said William G. Ridgely, Ann C. Ridgely, and Matilda L. Ridgely executed a deed of all their property in Maryland to John G. Proud, Jr., bearing date the 5th of October, 1859; and it is admitted that no consideration was paid by Proud for the grant to him in said deed, but that the same was executed to remove a difficulty in the way of the exercise of the jurisdiction of this court.” It is also admitted that Samuel Chase Ridgely died in the summer of 1859. John G. Proud, Jr., is not made a party to the amended bill. The first difficulty which we encounter on the threshold of this case is that in reference to the jurisdiction of this court. The bill shows that three of the defendants are residents of the District of Columbia, and this was also one of the allegations of the original bill. Resting on that statement, if these defendants are indispensable parties to the cause, the case would be one clearly without the jurisdiction of this court; for, by the eleventh section of the Judiciary Act of 1789, the circuit courts of the United States have jurisdiction in civil suits at common law or in equity only where the matter

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in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiff or petitioners, or an alien is a party, or *the suit is between a citizen of the State where the suit is brought and a citizen of another State*. And the Supreme Court, as early as 1806, in the case of *Strawbridge v. Curtis and others*, 3 Cranch Rep., 267, decided that where there are two or more joint plaintiffs or defendants, each of them must be capable of suing or being sued in the courts of the United States to give the court jurisdiction. And this doctrine has never been departed from ; for in 1854, in the case of *Shields and others v. Barrow*, 17 Howard, 141, the Supreme Court, in speaking of the act of Congress of February 28th, 1839, which had been supposed to have altered the rule, say, that "this act does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction." And the court again affirm what they had before decided in *Elmendorff v. Taylor*, 10 Wheaton, 167, that, "if the case may be *completely decided as between the litigating parties*, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such a party be a resident of another State, ought not to prevent a decree upon its merits. But if the case cannot be completely decided, the court should make no decree." And this seems to have been the opinion of the learned counsel for the complainant, for in July, 1859, they file a petition, stating the execution of the deed from William G. Ridgely and others to Samuel Chase Ridgely, and praying that the bill may be dismissed as to them ; and by their subsequent petition, filed after the death of Samuel Chase Ridgely, they pray to make the three residents of the District of Columbia parties to the cause, as the devisees of Samuel Chase Ridgely.

Taking these facts, in connection with the written admission (to which I have referred) of the character and objects of this deed to Samuel Chase Ridgely, it shows, beyond any doubt, that the learned counsel felt that unless they could remove this difficulty they could hope for no relief in this court ; for this is a bill for partition, and for an account of wharfage received by the mayor and city council of Baltimore. The complainant claims as tenant in common with the defendants. Judge Story, in his

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Treatise on Equity Pleading, section 159, says: "*So tenants in common must all sue or be sued in cases touching their common rights and interests;*" and as this property, of which a partition is now claimed, was made at the sole expense of the mayor and city council, if complainant had any interest therein as tenant in common with the city, in making partition the city would be allowed for all expenses of said improvement. For, says the same learned author, in vol. 1 of his treatise on Equity Jurisdiction, section 655, in speaking of a case where one party has laid out large sums in improvements on the estate, "Although, under such circumstances, the money so laid out does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and compelling the party applying for partition to make due compensation."

Now, is the question altered by the deed to Samuel Chase Ridgely of the 8th of June, 1858? It was, *without consideration, made for the sole purpose* of removing, if possible, *this difficulty of want of jurisdiction, and with the understanding that Samuel Chase Ridgely was to reconvey the property to the said grantors whenever they requested him so to do.* Now, the Supreme Court has decided that the conveyance of the interests of non-residents to give the Circuit Court jurisdiction must be real and not fictitious. For this principle, see *McDonald v. Smalley and others*, 1 Peters, 624; *Smith and others v. Kemocher*, 7 Howard, 216. In this last case the Supreme Court says: "The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction, of course, cannot be upheld."

Now, the admission is, in effect, that such is the character of this deed, and that the real parties to the cause remained the same. It will not be necessary for me to notice a similar deed made by these parties since the death of Samuel Chase Ridgely to John G. Proud, Jr., as the counsel have not relied on the same, and Mr. Proud has not been made a party to the cause. But

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even if this difficulty did not exist, and the courts, from the residence of the several parties interested, had jurisdiction of the case, there is another objection to the court's passing any decree of partition or for an account of wharfage at this time. *The title of complainant is disputed*, and that being a question of law this court would not undertake to decide it, but its duty would be either to dismiss the bill or retain it for a reasonable time, to give the complainant an opportunity to have it decided at law. In Adams's Equity, last edition, page 519, in a note treating of partition, the rule is stated as follows: "But the title of the complainant must be undisputed, otherwise the bill will be dismissed, or else retained until the title is settled at law;" and in support of it the learned annotator refers to many authorities. In *Boone v. Boone*, 3 Maryland Chancery Decisions, 407, Chancellor Johnson says: "The court does not sustain a bill for partition unless the title be clear." In *Strangham v. Wright*, 4 Randolph, 493, the rule is given in the following language: "Where, in a bill for partition, if complainant's title is denied, and it depends upon doubtful facts or doubtful questions of law, a court of equity will either dismiss the bill or retain it until the right is decided at law." To the same point will be found the following cases: *Wilkin v. Wilkin*, 1 Johnson's Chancery Reports, 111; *Manners v. Manners*, 1 Green's Chancery Reports, 384; *Burton v. Rutland*, 3 Humphreys, 435; *Hosford v. Merian*, 5 Barbour S. C. Report, 52; and *Cox v. Smith and others*, 4 Johnson's Chancery Reports, 271. Now all must concede that the title of complainant depends upon doubtful questions of law. I am justified in saying this because her title has already been submitted to a court of law of her own selection, and which court decided against her, and its judgment was affirmed by the highest court of the State. I speak of the decision of Baltimore County Court in the ejectment case of *Mary Barney and others, lessee, v. The Mayor and City of Baltimore and others*, the record of which has been given in evidence in this case. It was an action brought to recover the identical property, of which a partition is now sought by the bill filed in this cause.

The defendants, in the trial of the case, presented several prayers to the court. The fourth is as follows: "The defend-

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ants, by their counsel, pray the court to instruct the jury that if they shall find from the evidence in the case that Samuel Chase, the elder, under whom the plaintiffs claim, made and executed and delivered the several leases and deeds offered in evidence by the defendants, and shall further find from the evidence in the case that at the time of the execution and delivery of the deed from Samuel Chase, the elder, to Samuel Chase, Jr., and Thomas Chase, no part of said street called Liffey Street was made south of the southerly line of Lee Street, and that no part of the City Block was then made, then the plaintiffs have no right in the suit to recover upon the evidence in the case any portion of Liffey Street lying south of the southerly line of Lee Street, *nor any part of the property located on the City Block.*" On this prayer the court indorsed, "Granted, but not for the reasons therein stated, *but because the plaintiffs have not shown any title to the City Block,* and because, although they have shown title to Liffey Street, yet, *as it is a public highway by dedication and contract with the city,* ejectment will not rely to recover it."

Now, as the Court of Appeals gave no opinion in the case, we do not know whether that court sustained all or what instructions of the lower court, which were fatal to the plaintiffs' case; but this is clear, as a part of the block was not used *as a highway*, ejectment would have lain for that part; and the Court of Appeals must therefore have sustained the instruction of Baltimore County Court, that as to that part, the plaintiff had shown no title. Now, in this cause, we have no evidence that was not before Baltimore County Court; and if I had full jurisdiction in the case, I should feel it to be my duty to dismiss this bill, as it has been filed with full knowledge that the title of the complainant was disputed by the city, and after a court of competent jurisdiction had passed adversely upon the title to a part, if not to all of the property in question. But if the cause was free of these preliminary difficulties, from a careful investigation of the several grounds upon which the complainant's counsel have placed her claim to a share of the property in dispute, I am of the opinion that that claim cannot be sustained either at law or in equity.

Now, what are the facts of this case? Originally the waters

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of the northwest branch of the Patapsco River swept around the most western point of *Fell's Point* (east of where the drawbridge now stands), and first turning northeast ran until within about one hundred feet of Bond Street, thence turning northwesterly ran nearly up to Wilk Street, continuing westerly, passed on to Jones's Falls some distance above where Pratt Street now crosses that stream, and thence flowed on westwardly to some distance beyond what is now Light Street wharf. That on or about 1796, from the deposits of mud and sand brought down by Jones's Falls and deposited near its intersection with the river, the water of the basin only flowed at high water up to the south side of Pratt Street at its intersection with Liffey Street, but at low tides the ground was bare for some distance below. It was in this year that Judge Chase received his deed from Daniel Bowly for a lot of ground beginning at the intersection of the south side of Water Street with the west side of Jones's Falls, extending south on the west side of the falls to the south side of Barre Street, with a width of one hundred and seventy-three feet.

Judge Chase then being the owner in fee and riparian proprietor of this lot, fronting one hundred and seventy-three feet on the water of the basin, under permission from the mayor and city council of Baltimore, granted by ordinance passed March 23d, 1802, extended his said lot to the south side of Lee Street; and in 1804 he obtained the further permission from the corporation to extend his said lot from the south side of Lee Street south three hundred and fifty-five feet, so as to include a bar which had been made by natural causes in the river, opposite to his wharf. This last extension was never completed by Judge Chase. Judge Chase being then the proprietor of this lot binding on the west side of Jones's Falls, laid out into lots first, that part lying between Water and Pratt Streets; and subsequently, that part lying between Pratt and south side of Lee Street, and along the whole eastern fronts of the lots, he so laid out and leased, and between said front and the west side of Jones's Falls, he laid out a street or wharf, which below Pratt Street he called "*Liffey Street*." In his lease to *James Clarke*, in 1798, in describing the lot laid, he calls it "*a public wharf*" (forty feet wide), and the lines of the lot run to and bind on it.

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In his lease to Lewis Hart made in 1806, he described the lot leased "as running with Pratt Street thirty feet to the west side of a street forty feet wide, laid off by the said Samuel Chase from Pratt Street and adjoining the water, heretofore called Jones's Falls, to the south side of Lee Street." And in his deed to Samuel Chase, the younger, in 1808, conveying to him in fee five lots, fronting one hundred and fifty feet on this street at the distance of ninety feet south of Pratt Street, he describes them as binding on this (Liffey) street, which was delineated on the plat made by him of his said ground. Hart proves, that prior to 1811, he used a part of the head of Liffey Street, below Pratt Street, as a lumber-yard, and put a gate across it to protect his lumber, although it was then used as a public way; that in 1814 his gate was removed, and it is not denied that since that period it has been used as a public highway and street of the city. That, as it at present exists as a street and wharf, with the large space called the *City Block* at its southeastern extremity, it has been made by the city under various ordinances for the improvement of the "*Cove*," between the years 1817 and 1836.

There is also in evidence a deed from Thomas Chase and Samuel Chase, two of the children of Judge Chase, to the city in 1818, for the bed of Liffey Street, as laid out by their father, Samuel Chase, the elder; but in the view I take of the law in this case, this deed is wholly immaterial, and I shall not further notice it. Now, the first question that presents itself is, was Liffey Street ever dedicated to public use as a highway by Judge Chase? Of this I have no doubt. Such dedication may consist in a simple acquiescence, or in positive and unequivocal acts, signifying the owner's intention to give up the soil to this object. Where the dedication is claimed by mere acquiescence on the part of the owner, the use by the public must have been at least twenty years; but a less period will be sufficient where there is any positive assent on his part, showing an intention to appropriate the soil to that purpose. For this see 3 Kent's Com., 450, and 2 Smith's Leading Cases, with Hare and Wallace's notes, page 90, the case of *Doraston v. Payne*. In the note to this case all the authorities upon the subject are cited.

They will be found to maintain this proposition: that if one

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owning land exhibit a map of it on which a street is defined, though not as yet opened, and building lots be sold by him with a front or rear on that street, this is an immediate dedication of that street for public use. Now the evidence in this case shows that Judge Chase laid out his property into lots, and bounded them on Liffey Street, which he marked out on the plat *as a street*, and sold and leased his lots with that description. And Baltimore County Court (Judge Archer), with the same evidence before it, decided that they constituted a dedication of this street to public use, which will appear by reference to the fifth instruction granted by that court in the ejectment case to which I have referred. Now the important question arises, *To what extent is this dedication made?* I grant it does not carry the fee to the public, for that remains either in the original owner (which I think is the true rule), or (as some authorities seem to maintain) to those who have purchased lots binding on it.

Is it a dedication of *only the bare easement* of passing over the soil? I am of the opinion that where, in a city, a street which is laid out to bind on or run to the river, is dedicated or surrendered to the public use, it gives the public the right to use it for any purpose for which public streets are used in that city. *It makes it public for all purposes*, unless some express reservation is made in the act of dedication. Binding on the river it gives the public the right to use it as a wharf and to permit vessels to be loaded and unloaded at it. Angell, in his Treatise on Highways, section 301, says: "At common law, a highway is simply an easement or servitude, carrying with it as its incidents the right to use the soil for the purposes of repair and improvement, and in cities for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and commerce."

The Supreme Court, in the case of *The City of Cincinnati v. The Lessee of White*, 6 Peters, 437, says: "All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country." So the right to pass water and gas

under the surface of streets, and to lay down railroads on them, has been sustained. Now I propose to show, that wharfage at the ends or sides of public streets belonged to the corporation of Baltimore, except in some few cases where, by the acts of Assembly authorizing the improvement, the right to collect the wharfage was given to the parties making the said improvement.

By Section 12 of the act of Assembly of 1783, ch. 24, it was enacted, "that the port wardens of Baltimore town shall be and they are hereby authorized to make such regulations from time to time respecting wharves and wharfage," etc., etc., and the city, which was incorporated in 1796, was vested with all the powers which had heretofore been given to the port wardens; and by the 8th section of the Act of Incorporation, among the general powers granted, was one to regulate the station, anchoring, and moving of vessels, and to provide for deepening and cleaning the basin and docks. I suppose that the right to regulate and to deepen and clean the docks would carry with them the right to collect wharfage, as a necessary means to give effect to and to enable the corporation to exercise the power especially granted. Whether this be or not, certain it is that the city exercised that right at a very early day in its history. For, by an ordinance passed on the 24th April, 1797 (not quite four months after the Act of Incorporation), which is entitled "*An Ordinance to preserve the navigation of the harbor of Baltimore, and to provide for the exercise of the powers heretofore vested in the Port Wardens by the Act of Assembly,*" it is enacted and ordained (by its 8th section) that the following wharfages shall be collected for the articles hereafter enumerated, *landed at any public wharf within the city limits*, etc., etc. And to show what was meant by the term "public wharves," by an ordinance passed March 19th, 1798, it is enacted, "that all wharves made out into the basin or harbor in front of any street or part of a street, and which street was heretofore laid out in the plan of the town as extending to the water, *are hereby declared public wharves, and subject to the wharfage imposed and laid by the ordinance of 1797.*" And this power the city continued to exercise until it was taken away by the act of 1813, but it was restored to the corporation by the act of 1827, ch. 162, by which the city was authorized to collect

wharfage "*on any wharf or wharves* belonging to the said mayor and city council, or on *any public wharf in said city*, other than the wharves belonging to and rented by the State, and that part of Pratt Street wharf heretofore used by the citizens of the State." Now there are certain public wharves in the city on which the proprietors of the adjoining property or other individuals collect wharfage, but in those cases the right to do so was expressly reserved to the parties making the improvement.

This was the case in reference to the making of Light Street wharf; for by the act of 1796, ch. 45, sections 3 and 5, the right to charge wharfage on said wharf was given to the parties, proprietors of lots binding on the same, whose duty it was to fill up and perfect the said improvement. And by the act of 1817, ch. 148, in which provision is made for the improvement of Jones's Falls, by its 11th section it is enacted, "that should the mayor and city council succeed in rendering Jones's Falls navigable, they are authorized to collect wharfage upon vessels navigating the same or lying at the public wharves opened or constructed on its banks, provided, that the right to wharfage on Liffey Street shall not accrue to the said mayor and city council until they shall have engaged to wharf and fill up said street and deepen said Falls on the side thereof adjoining said street, *if the said street be given up to the said city.*" This proviso does not say, "*if the fee in said street be conveyed to the said city,*" but, as I read it, *if it be surrendered as a highway to said city.*

This, I have endeavored to show, had already been done, and the city complied with its part of the said proviso, by filling up and wharfing at said street, and by deepening the said Falls. Now am I right in the view I have taken as to the effect of a dedication of a street to the public, where that street either runs to or binds on navigable water? Is it not reasonable? The corporation of Baltimore is bound to regulate and repair all the public wharves. The natural fund to defray this necessary expenditure is the wharfage, an income derived from those who enjoy the benefit of this expenditure. I am not without authority to sustain me. In the case of *The Town of Newport (Kentucky) v. Taylor's Executors*, the right of the town to charge wharfage at the wharf erected at the side of the *common*, and to establish

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a ferry from that point across the Ohio, became the subjects of dispute. *The common* had been set apart for the public use when the ancestor of the defendant had laid out the town, and it was bounded by the Ohio River.

The Court of Appeals of Kentucky decided that the town of Newport had no right to establish a ferry, as the right to do so was a franchise grantable by the legislature, but that the dedication of the common extending to the Ohio River included the right of constructing wharves and charging wharfage. (See court's opinion in this case, 16 B. Monroe, 804.) The great case of *The City of New Orleans v. The United States*, reported in 10 Peters, 662, involved the rights of the city to the made ground in its front on the banks of the Mississippi. The city claimed the same by virtue of the fact that all the space of ground which existed between the front line of the houses of the city and the river Mississippi was left by the King of France, under the name of *quays*, for the use and benefit of the inhabitants, as appeared by authentic copies of the original plans of the foundation of the city.

The Supreme Court, in their opinion, say, on page 717: "If the dedication of this ground to public use be established by the principles of the common law, is it not of the highest importance that the accumulations of the vacant space, by alluvial formations, should partake of the same character, and be subject to the same use, as the soil to which it becomes united? If this were not the case, by the continual deposits of the Mississippi the city of New Orleans would, in the course of a few years, be cut off from the river. *If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor.*" Now does the case of *Dugan v. The Mayor and City Council of Baltimore* in any way come in conflict with these authorities or with the view I have taken of the effect of the dedication of a street binding on the water? I think not. That was a contest between the parties in reference to which of them the right belonged to charge wharfage on the sides of the dock below Marsh Market Space, which sides *were public streets*.

The Court of Appeals, 5 Gill & Johnson, 374, decided that it belonged to the city, and (as I read the report of the case) on

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in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiff or petitioners, or an alien is a party, *or the suit is between a citizen of the State where the suit is brought and a citizen of another State.* And the Supreme Court, as early as 1806, in the case of *Strawbridge v. Curtis and others*, 3 Cranch Rep., 267, decided that where there are two or more joint plaintiffs or defendants, each of them must be capable of suing or being sued in the courts of the United States to give the court jurisdiction. And this doctrine has never been departed from; for in 1854, in the case of *Shields and others v. Barrow*, 17 Howard, 141, the Supreme Court, in speaking of the act of Congress of February 28th, 1839, which had been supposed to have altered the rule, say, that "this act does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction." And the court again affirm what they had before decided in *Elmendorff v. Taylor*, 10 Wheaton, 167, that, "if the case may be *completely decided as between the litigating parties*, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such a party be a resident of another State, ought not to prevent a decree upon its merits. But if the case cannot be completely decided, the court should make no decree." And this seems to have been the opinion of the learned counsel for the complainant, for in July, 1859, they file a petition, stating the execution of the deed from William G. Ridgely and others to Samuel Chase Ridgely, and praying that the bill may be dismissed as to them; and by their subsequent petition, filed after the death of Samuel Chase Ridgely, they pray to make the three residents of the District of Columbia parties to the cause, as the devisees of Samuel Chase Ridgely.

Taking these facts, in connection with the written admission (to which I have referred) of the character and objects of this deed to Samuel Chase Ridgely, it shows, beyond any doubt, that the learned counsel felt that unless they could remove this difficulty they could hope for no relief in this court; for this is a bill for partition, and for an account of wharfage received by the mayor and city council of Baltimore. The complainant claims as tenant in common with the defendants. Judge Story, in his

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that the said grantors in said deed have no legal standing as devisees of Samuel Chase Ridgely to be parties to this bill.

There are also filed in the cause two papers, stating in detail the several facts which have been admitted by the parties. These relate principally to the relationship of the said parties to Judge Chase, and contain the agreement, that either party may offer in evidence the record of the ejectment suit brought by the complainant for this property against the mayor and city council of Baltimore in Baltimore County Court; and that the plats, deeds, and evidences may be read from the record in said case, as evidence in the trial of this cause. The only parts of these admissions which it becomes necessary for me to notice particularly, are the following :

“It is admitted in this case, that the deed of the 8th of June, 1858, to Samuel Chase Ridgely from William G. Ridgely and others, was made without valuable consideration, and to enable the court to dispose of the case, as if the grantors in the deed had no interest in the matter in question in the cause; it being further understood, that on request of the grantors, the property conveyed by that deed should be passed to the grantors.”

Also, “the said William G. Ridgely, Ann C. Ridgely, and Matilda L. Ridgely executed a deed of all their property in Maryland to John G. Proud, Jr., bearing date the 5th of October, 1859; and it is admitted that no consideration was paid by Proud for the grant to him in said deed, but that the same was executed to remove a difficulty in the way of the exercise of the jurisdiction of this court.” It is also admitted that Samuel Chase Ridgely died in the summer of 1859. John G. Proud, Jr., is not made a party to the amended bill. The first difficulty which we encounter on the threshold of this case is that in reference to the jurisdiction of this court. The bill shows that three of the defendants are residents of the District of Columbia, and this was also one of the allegations of the original bill. Resting on that statement, if these defendants are indispensable parties to the cause, the case would be one clearly without the jurisdiction of this court; for, by the eleventh section of the Judiciary Act of 1789, the circuit courts of the United States have jurisdiction in civil suits at common law or in equity only where the matter

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in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiff or petitioners, or an alien is a party, *or the suit is between a citizen of the State where the suit is brought and a citizen of another State.* And the Supreme Court, as early as 1806, in the case of *Strawbridge v. Curtis and others*, 3 Cranch Rep., 267, decided that where there are two or more joint plaintiffs or defendants, each of them must be capable of suing or being sued in the courts of the United States to give the court jurisdiction. And this doctrine has never been departed from; for in 1854, in the case of *Shields and others v. Barrow*, 17 Howard, 141, the Supreme Court, in speaking of the act of Congress of February 28th, 1839, which had been supposed to have altered the rule, say, that "this act does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction." And the court again affirm what they had before decided in *Elmendorff v. Taylor*, 10 Wheaton, 167, that, "if the case may be *completely decided as between the litigating parties*, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such a party be a resident of another State, ought not to prevent a decree upon its merits. But if the case cannot be completely decided, the court should make no decree." And this seems to have been the opinion of the learned counsel for the complainant, for in July, 1859, they file a petition, stating the execution of the deed from William G. Ridgely and others to Samuel Chase Ridgely, and praying that the bill may be dismissed as to them; and by their subsequent petition, filed after the death of Samuel Chase Ridgely, they pray to make the three residents of the District of Columbia parties to the cause, as the devisees of Samuel Chase Ridgely.

Taking these facts, in connection with the written admission (to which I have referred) of the character and objects of this deed to Samuel Chase Ridgely, it shows, beyond any doubt, that the learned counsel felt that unless they could remove this difficulty they could hope for no relief in this court; for this is a bill for partition, and for an account of wharfage received by the mayor and city council of Baltimore. The complainant claims as tenant in common with the defendants. Judge Story, in his

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complainant or respondent in their arguments, yet that is a question to be considered in the opinion of the court, and the first properly demanding attention.

All the authority vested in the courts of the United States to hear and determine causes arises under the provisions of the Constitution of the United States or acts of Congress.

By the provisions of the Constitution the Supreme Court of the United States is established, and its jurisdiction prescribed directly, and it is further provided that Congress shall have power to create or establish inferior courts.

Then we think that it necessarily follows that Congress has the power to prescribe the jurisdiction of such courts. We are sustained in this view by the opinion in the case of *Osborne v. The United States Bank*, 9 Wheat., 738, and *Sheldon v. Gill*, 8 How., 448.

The second section of the third article of the Constitution relates to the subjects or classes of cases declared to be within the jurisdiction or power of the United States courts, and is as follows :

“The judicial power shall extend to all cases in law and equity arising under this Constitution ; the laws of the United States, and treaties made, or which shall be made under their authority ; to all cases affecting ambassadors, other public ministers and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States ; between a State and citizens of another State ; between citizens of different States ; between citizens of the same State claiming lands under grants of different States ;” and lastly, “ between a State, or the citizens thereof, and foreign States, citizens, or subjects.”

If the framers of our Constitution had proceeded no further, it might be contended with more reason that this suit as instituted comes within the jurisdiction intended to be conferred upon the circuit courts, but, as if to leave no doubt upon the subject, they proceed, in the second clause of the second section of the third article, to enumerate the class of cases over which the Supreme Court shall have original jurisdiction, and with these we find all cases affecting ambassadors, other public ministers and

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consuls, and those in which a State shall be a party; and it is further provided that, as to all other subjects included within the jurisdiction prescribed, the Supreme Court shall have appellate jurisdiction.

It may be said that, though original jurisdiction is by this provision of the Constitution conferred upon the Supreme Court, it is not exclusive, but only concurrent with some other tribunal.

We think that a fair construction of the language of the Constitution excludes such a conclusion, and we are happily sustained in this opinion by the opinion of the court in the case of *Gale v. Babcock*, 4 Wash. C. C. Rep., 199.

It will be seen that in this case it is decided that the circuit courts have no jurisdiction of a cause in which a State is a party.

If more authority should be desired upon this point, we refer to the case of *Osborne v. The United States Bank*, 9 Wheat., 820, in which it is declared that, in such cases in which original jurisdiction is conferred upon the Supreme Court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form.

In the case before us the State of North Carolina is complainant, and the only complainant, and it is the character of that party that brings the case within the original jurisdiction prescribed for the Supreme Court, and consequently, according to the opinion of the court in the case last cited, is excluded from the appellate jurisdiction of that court.

Again, in the cases of *Martin v. Hunter's Lessees*, 1 Wheat., 237, *Cohen v. Virginia*, 6 Wheat., 392, it is decided that, in such cases as draw in question the laws, Constitution, or treaties of the United States, though a State may be a party, the jurisdiction of the Supreme Court is appellate, for in such a case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. Such cases may be taken by appeal or writ of error from the highest judicial tribunal of a State to the Supreme Court of the United States.

The great American constitutional judge, in delivering the

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opinion of the Supreme Court of the United States in *Cohen v. The State of Virginia* before referred to, uses this language :

“ It has also been argued, as an additional objection to the jurisdiction of the court, that cases between a State and one of its own citizens do not come within the general scope of the Constitution, and were obviously never intended to be made cognizable in the Federal courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true (says this learned judge), so far as the jurisdiction depends upon the character of the parties.

“ If the jurisdiction depended entirely upon the character of the parties, and was not given where the parties had not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the Constitution and the laws of the United States would be mere surplusage. It may be true that the partiality of the State tribunals in ordinary controversies between a State and its citizens was not apprehended, and therefore the judicial power of the Union was not extended to such cases.”

The ground, as is seen, upon which the jurisdiction of this court is claimed in this case, depends upon the character of the parties, and not the character of the subject in controversy.

All we have said, it will be observed, relates more particularly to the provisions of the Constitution, and in regard to the prescribing and the distribution of the judicial power of the United States.

The act of seventeen hundred and eighty-nine, section twenty-four, is the first whereby Congress undertook to prescribe the jurisdiction of the circuit courts, and we find by the seventeenth section of that act that such courts are vested with original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds a certain sum stated, and the United States are plaintiff or petitioner, or an alien is a party, or the

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suit is between a citizen of the State where the suit is brought and a citizen of another State.

It is quite clear, we think, that the provisions of this act do not embrace a case in which a State is a party.

This question, however, was raised soon after the passage of the act in the case of *Gale v. Babcock*, before referred to; and in this case it was decided that the Circuit Court had no jurisdiction between a State and its citizens, or citizens of other States.

It was at one time supposed that the Constitution gave a broader power to the court. But it has been long since settled that the civil jurisdiction of the circuit courts is governed by the acts of Congress. *Turner v. Bank of North Carolina*, 4 Dall., 10; *McIntyre v. Wood*, 7 Cr., 506; *Kendal v. United States*, 12 Pet., 616; *Carey v. Curtis*, 3 How., 245.

But the power to entertain this suit is claimed by counsel, for this court, under the provisions of the Bankrupt Act of eighteen hundred and sixty-seven. After a careful examination of the provisions of that act, we are of opinion that it was not designed to confer, and does not, in fact, confer such power.

If we could believe that the original jurisdiction conferred by that act upon the circuit courts was as full as or equal, in all respects, to that conferred upon the district courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the Constitution before referred to, limiting and restricting, according to our construction, the original jurisdiction in cases in which States are parties, to the Supreme Court.

We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this court; and further, if it was clearly otherwise, that any attempt to do so on the part of Congress would be ineffectual; for, as has been before seen, the Constitution having itself provided that the jurisdiction in such cases should be original in the Supreme Court, it must be regarded as exclusive of the other courts of the United States, as much so as if the term *exclusive original jurisdiction* had been employed. And this appears to us to be the view entertained by the court in the case of *Osborne v. The United States Bank*, before cited.

Syllabus.

It has been suggested that there has been greater necessity for the exercise of jurisdiction by this court in this case, because, as is insisted by the bankrupt law, the jurisdiction conferred upon the district and circuit courts of the United States is exclusive, and that no suit by or against an assignee can be maintained in the State courts.

We agree that the only jurisdiction *actually conferred by that act* is with these courts; but it does not follow that an assignee may not sue or be sued in the State courts, and we think that an assignee may sue or be sued in the State courts.

If we entertained the opinion that all controversies respecting a bankrupt's estate could only be heard and determined in the district or circuit courts of the United States, we confess that we would express the view we entertain with much more hesitation than we now feel.

Let the bill be dismissed.

*District Court of the United States for the District of West Virginia,
exercising Circuit Court Powers, November, 1875.*

UNITED STATES *et al.* *v.* BALTIMORE AND OHIO RAILROAD
COMPANY.

Under the act of March 3d, 1819, authorizing the Secretary of War to sell "such military sites belonging to the United States as may have been found or become useless for military purposes," and the act of 28th April, 1828, authorizing the President to "sell forts, arsenals, dockyards, lighthouses, or any property held by the United States for like purposes," the Secretary of War had authority to execute the agreement it made with the Baltimore and Ohio Railroad Company on the 5th November, 1838, conceding to the company "authority to construct their railroad along and over their property" at Harper's Ferry, Virginia.

The grant by Congress to the President, of a right to dispose of the full title in fee in real property, implies the grant of all minor powers, and these powers may be exercised by the Secretary of War as agent of the President.

Where, under a contract perpetual in its purport, a license to use property for specific purposes is not specially restricted, and is coupled with an

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interest which was necessary to the possession and enjoyment of the rights acquired under the permission, the license is not revocable as long as the interest exists; and though the fee simple remains in the grantor, the right to use is paramount to the fee, and the doctrine of equitable estoppel applies against the grantor.

IN equity.

JACKSON, J.—The bill filed in this cause seeks—

First.—To cancel an agreement in writing, entered into November 5th, 1838, between Joel R. Poinsett, then Secretary of War of the United States, and Louis McLane, then President of the Baltimore and Ohio Railroad Company, under which agreement the railroad company claims title to so much of a tract of land known as the “Harper’s Ferry property,” as is used and occupied for the purposes of its road.

Secondly.—To remove a cloud upon the title of the government to the property, growing out of a claim of title derived from one Patrick Byrne to that portion of it occupied by the defendant.

It is conceded that the United States derived title to the Harper’s Ferry tract through sundry conveyances made in 1796, and afterwards, “to George Washington, President of the United States, and his successors in office;” that by virtue of the conveyances so made, the government of the United States became seized and possessed of this tract of land, and continued to hold possession of it (except that portion occupied by the railroad company) from 1796 until the 30th of November, 1869, when it was sold by the government to Francis C. Adams.

That shortly after the government acquired the property, she established upon it a national armory, which was used for the manufacture of arms and munitions of war until the armory was destroyed, in the year 1861.

This being the condition of the property in the year 1838, the railroad company applied, through its President, Louis McLane, to the government of the United States for permission to occupy a portion of the tract for a right of way across it for railroad purposes, which resulted in the agreement of November 5th, 1838, between Joel R. Poinsett, then Secretary of War, on be-

half of the government of the United States, and Louis McLane, on behalf of the railroad company.

By the terms of that agreement, "authority was conceded by the government to the railroad company to construct their railroad along and over the property of the United States." It is claimed by the defendant, the railroad company, that under and by virtue of this agreement, it has an easement in the property occupied by it so long as it is used for railroad purposes.

But if it should be mistaken in this position, the company claims title to the land in controversy under a deed from Patrick Byrne, who claimed it under a grant from the State of Maryland, whose jurisdiction extended to the south bank of the Potomac River.

With reference to the second position of the defendant, which I propose to consider first, it is alleged that the railroad tracks, and, in fact, all the ground used for railroad purposes, is a "fill," built by the company in the river, and upon what is claimed to be its bed at the date of the agreement between the government and the railroad company, within the territory of Maryland, and, consequently, covered by the Byrne title. However this fact may be, it is not deemed to be a matter of importance in this case, as the defendant first took possession of the property in controversy, claiming it under the agreement of November 5th, 1838; and so far as the question of possession arises between the United States and the defendant, it is a matter of no moment whether the United States had a good title, or whether the Secretary of War had authority to execute the agreement. By the express terms of the agreement, the defendant was to build a sustaining wall parallel to the then existing wall built by the government, between it and the river in some places, and within the river at others, for the purpose of making the "fill" upon which the railroad track was to be built. Thus it appears that the defendant, under an express provision in this agreement, was to build a wall and make the necessary fill, deriving its authority for so doing from the government alone. If stronger evidence was required to establish the intention and understanding of the parties at the time the agreement was entered into, none could be brought. At that time no one questioned the right of the

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government to the property, and being a riparian owner, she was entitled to any accretions, whether the result of the action of the water, or the result of labor and skill applied and used to confine the river to what appeared to be its natural channel, so far as it would not interrupt the flow of water or obstruct navigation. The government had a clear right to authorize, as she did, the erection of the wall, not only for the purposes of a railroad bed, but to furnish a bank for the river, so as to prevent its encroaching further upon the main land.

This view of the case explains clearly the conduct of the parties at the time, and tends to establish the fact, that the river at the date of the agreement had by its wash encroached on the main land, some distance beyond its original limits. But that fact did not alter the boundary line between the States, and hence both parties must have regarded the property as within the jurisdiction of Virginia when the agreement was made; otherwise, it would not have been entered into with its existing terms and conditions.

But suppose at the time the agreement was entered into, the title of Patrick Byrne covered the land in controversy? Would that fact alter the legal relations between the parties in this case? I think not?

The defendant did not acquire the title of Byrne until September, 1841, long after the agreement made with the United States under which they took possession of the disputed property. When the deed of Byrne was executed, it passed nothing, because he was out of possession of the property intended to be conveyed, and the possession of it was had under a claim of title adverse to him.

If, however, it had passed any title, the defendant took it in subordination to the title of the government. At the time of the execution of this deed, the defendant was a tenant under the United States, and was bound by every obligation, both legal and moral, to protect the title of its landlord until it should restore the possession of the property to it. True, it might disclaim the tenancy by actual notice, or by such notorious acts as would be equivalent to such notice. It is not, however, pretended that any such disclaimer was ever made in the case. On

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the contrary, the defendant, in its answer, claims right to the possession and use of the property under the agreement made with the Secretary of War, November 5th, 1838. Holding this relation to the United States, it cannot shelter itself behind the Byrne or any outstanding title, but must stand or fall with the title it acquired from the United States.

This brings me to consider the first ground of defence set up by the defendant in answer to the bill of the complainants, to wit, the validity of its title under the United States. It is not questioned, and in fact it cannot be denied, that if the claim of the United States covered the land in controversy, her title is good. That being conceded, the next question that presents itself for consideration is, has the defendant an inchoate or perfect title from the United States?

The consideration of this question involves the authority of the Secretary of War to make the agreement he did of November 5th, 1838, which the complainants in this action very gravely question, and insist that the action of the Secretary of War is without color of authority, and absolutely void or voidable. Congress, by an act passed and approved by the President at an early date, established a national armory upon this property at Harper's Ferry, by which it became dedicated to military purposes. From the time of its dedication to the date of the agreement between the Secretary of War and the railroad company, it was alone used as a site for military purposes. During that period, arms and munitions of war were there manufactured under the direction of the War Department. This property, as well as all military property belonging to the United States, is and always has been under the general management of the Secretary of War. With the knowledge of this fact, Congress, by an act passed March 3d, 1819, invested the Secretary of War with authority to make sale of "such military sites belonging to the United States as may have been found or become useless for military purposes."

As far back as the 6th day of May, 1836, construction was given to this act by Mr. B. F. Butler, then Attorney-General of the United States, in which opinion he held that the Secretary of War was authorized to make sale of any "military sites" belong-

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ing to the government at the date of the act, which were no longer needed for military purposes. Attorney-General's Opinions, vol. 3d, page 108.

The government seems to have adopted this construction, and its correctness does not appear to have been since questioned. In the case of the *United States v. Chicago*, 7 Howard, 188, the Supreme Court of the United States refer to this act, and concede the power of the Secretary of War to sell what was then known as Fort Dearborn, or any portion of *that property*, under it.

It will be seen that the power claimed for the Secretary of War under this act is sustained not only by precedent in the department, but by judicial authority.

But it is claimed, that the act applies only to military sites, such as public forts and dockyards, and not to a property used for the purpose of manufacturing arms and munitions of war. It must be borne in mind, however, that Congress, in establishing the public armory at Harper's Ferry, fixed its location and dedicated it to military purposes. That it was a military site, used for military purposes, seems to me not to admit of a doubt. But precedent is not wanting for this position. The view of the question is sustained by Mr. Crittenden, when Attorney-General of the United States, in discussing the power of the Secretary of War under this statute, in regard to the property now in question. Attorney-General's Opinions, vol. 5, page 550. Under this opinion of the Attorney-General, the Secretary of War laid out a large portion of the public property at Harper's Ferry, not needed for military purposes, into town lots, streets and alleys, and the lots were sold to parties who took possession under the title thus derived from the government, and they are so held to this day. So far as it now appears, no question has been raised as to the power he exercised upon that occasion. The government having in all its branches acquiesced in this action of the War Department, she should not be permitted to change her position with reference to this property, but her rights should be determined according to the construction heretofore given the act, which seems to me not only to be warranted by its terms, but does no violence to the language employed to express its object.

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I have thus far examined the act of 1819, and the powers of the Secretary of War under it. The defendant, however, does not rely alone upon it for its defence, but seeks to protect itself under the act of 1828. This act authorizes the President to "sell forts, arsenals, dockyards, lighthouses, or any property held by the United States for like purposes," when no longer needed for the purposes for which they were used. Under this statute the power to sell is expressly conferred upon the President. It is claimed, however, that this agreement was the act of the Secretary of War, and not of the President, and therefore not within the words of the statute, and, as a consequence, is not binding on the United States. It is now well settled, that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." This property belonged, as I have before said, to the War Department, and was under the immediate control of the Secretary of War. He was, in the making of this agreement, but the agent of the President, and I feel justified in presuming that it was done under his direction, and with his assent, and is therefore, in contemplation of law, the act of the President. *Wilcox v. Jackson*, 13 Peters.

I, therefore, conclude that by both the acts of 1819 and 1828, the Secretary of War was authorized to sell any property belonging to his department not longer needed by the government. It is suggested, however, that although the power be conceded, he did not exercise the right conferred by the statute, but instead of selling the property, he "granted permission to the railroad company to run their road through the lands belonging to the United States." It is sufficient to say in reply to this position, that the Secretary of War is by law invested with the power to look after and take care of all public property belonging to his department, and so to use and manage it as will be best for the public interests. Whilst he could not sell, or by any act of his part with the legal title to any property belonging to the United States, except under authority derived from Congress, yet, as incident to the power of his office, and in the exercise of a discretion with which all heads of departments are vested, he would have the right to lease property not longer needed for

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public purposes, not only for the preservation of it, but, if practicable, to render it productive of revenue to the government, until it could be disposed of in pursuance of law. Being invested with authority to dispose of it by grant in fee, all minor powers over the property are necessarily implied.

This conclusion brings me to notice briefly the rights acquired by the defendant under this agreement. Under the permission granted in this agreement, the railroad company entered upon and took possession of the disputed property, and constructed their line of railway across it. The license granted was for an indefinite period, no time being fixed when the permission to use the lands for the purpose specified in the agreement was to terminate. Up to this time it has never been revoked, nor has any notice been given by the government of its intention or even its desire to revoke it, until the institution of this suit.

The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a railroad from Baltimore to the Ohio River, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory.

That it was so understood by the Secretary of War is shown by the fact that he expressly provided in his agreement with the defendant that "the said company shall allow the United States to construct and keep up forever a depot, with suitable tracks, switches, and turnabouts, to be connected with said road." Here there is a reservation of a right forever upon the part of the agent of the government, clearly indicating that he understood that the defendant was to use and enjoy the license thus granted as long as it should see proper to do so. The inference is clear to my mind that it was the intention of the Secretary of War to dedicate the property granted under this license to this specific use, which was a public one. It was for a great national highway. Having so donated and declared the purposes and object of the

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donation, it became dedicated to the specific purposes indicated. By this act upon the part of the United States, through their agent, the defendant, as well as the public through it, has acquired an easement in the property, so long as it continues to use it for the purposes granted, which is said "to be a liberty, privilege, or advantage which one may have in the lands of another without profit." The owner of the fee, whoever he may be, cannot revoke the license granted. The fee will remain in the original owner, or his grantees, but the right of the defendant to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. *M. E. Church v. Hoboken*, 33 N. J. L.; *Wilson v. Sexon*, 27 Iowa, 15.

And here the doctrine of equitable estoppel may be justly applied. Under the permission given, the defendant built its railroad over the land of the complainants, with their knowledge and assent, which depends for its value on remaining in its present position. Acting in good faith, it was influenced to make large expenditures both of time and money in its construction.

The plaintiffs were influenced in granting the license by the benefits to be derived from the construction of the road in furnishing them with better facilities of transportation at reduced rates. It was simply the advantage of a railroad for transportation over the old wagon-roads, which, in the light of subsequent events, proved to be of incalculable benefit to the property. The benefits thus derived, whilst they may not amount to a valuable consideration, were the inducements that operated upon the complainants to grant the license. It was a power coupled with an interest, which was both necessary to the possession and enjoyment of the rights acquired under the permission, and is not revocable as long as the interest exists. Were it otherwise, a revocation of the power would follow, and the defendant would be constrained to remove its railroad at a great loss. Such a result would work gross injustice to the defendant, and would allow the complainants to take advantage of their own wrong.

It is here that equity interposes her power to estop the complainant from disturbing the defendant in the rights acquired by it under the agreement, otherwise it would have no remedy. It is now the settled doctrine that "equity will execute every agree-

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ment, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy." In this case no adequate compensation could be made the defendant for the damages it would sustain by the revocation of its license and the loss of rights acquired under it. The complainant having without objection permitted the defendant to construct over their lands a public railroad, "cannot, after the road is completed, or large expenditures have been made thereon, upon the faith of their apparent acquiescence, reclaim the land or enjoin its use by the railroad company." *Goodin v. Cincinnati and Whitewater Canal Company*, 18 Ohio St., 169; *Cumberland Valley Railroad Company v. McLeanahan*, 59 Penn., 24, 31. And this doctrine is reaffirmed in 21 Ohio, 553, in which case the learned court declare that "it is the dictate of natural justice that he who, having a right or interest, by his conduct influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed afterwards to maintain it to his prejudice." Out of this just principle has grown the equitable doctrine of estoppel *in pais*, so well stated and strongly approved by Fonblanque in his Treatise on Equity, vol. i, chap. 3, sec. 4; by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; by Lord Maclesfield in the leading case of *Savage v. Foster*, 9 Modern R., 35.

In the case under consideration, no one can question the fact that the defendant was influenced in the course it pursued by the conduct of the government through its officer, the Secretary of War. The company entered upon the premises under its agreement with the government, and remained in the peaceable possession and the quiet enjoyment of them for a period of upwards of thirty years. During all this time not the slightest intimation was ever given to it of any claim whatever upon the part of the government to the disputed premises. I therefore conclude that, upon every principle, both legal and equitable, the complainants cannot and ought not to be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838.

Nor do I think a right of compensation exists in this case. No actual consideration is expressed in the agreement, and the omis-

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sion to do so implies that both parties understood that none was demanded.

It is manifest that the Secretary of War required no consideration, for the reason that he looked to the additional facilities of transportation the construction of the railroad would furnish, as well as to the enhanced value of the residue of the property consequent upon its construction.

It seems to me, therefore, that every consideration of justice between the parties requires me to treat and hold the license in this case as an executed contract giving an absolute right. I am therefore of the opinion that, upon any view of the case presented by the pleadings, the bill should be dismissed for the reasons assigned.

*United States Circuit Court, Eastern District of Virginia, at
Alexandria, January, 1877.*

WM. B. ROGERS *et al.* v. DAVID B. PARKER, U. S. MARSHAL.

Where a judgment at law had been rendered against a defendant, who had entered his appearance, through the inattention and neglect of his counsel, and the counsel was not pecuniarily responsible for the amount of the judgment, on a bill brought by this defendant to restrain all proceedings to collect the judgment;

Held, on demurrer, that the bill must be dismissed.

In equity.

The bill alleges the following series of facts:

Jesse J. Simpkins was appointed United States Collector at the port of Norfolk, Virginia, and the complainants became his sureties for the sum of \$50,000, prior to the war.

On the breaking out of the war Simpkins was indebted to the United States in the sum of \$11,000 and upwards.

He had in his hands, including that amount, in all \$16,489.80, of which \$10,000 was in gold belonging to the United States.

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At the commencement of hostilities he was ready and willing to pay to the United States the amount then in his hands, and used every possible exertion for that purpose.

Owing to the occupation of Norfolk by the confederate military forces, he was unable either to send the money to the United States or to keep it safely, and with a view to its greater security deposited the same secretly at night in the vaults of a bank at Norfolk.

The money subsequently becoming more insecure there, and feeling that he might be liable for moving the money contrary to law from the vaults in the custom-house office, it was secretly returned to the vaults again.

Major General Huger having at his command, present, an active and ample military force, demanded the money from Simpkins as an officer of the confederate authorities. Being unable to resist that demand, and hoping to secure the money to the United States, a conference was held between Simpkins, the sureties on his bond, and the United States District Attorney, and by the advice of that attorney it was arranged that the money should be placed as a special deposit in the treasury of the State of Virginia, under the belief that it would thus be secured to the United States, in the event of the failure of the confederate arms. General Huger consenting thereto, the money was so placed as a special deposit, and no part of the same has ever been removed, but is now there, as the complainants insist, the property and subject to the order of the United States.

Under these circumstances a suit at law was commenced by the United States in the Circuit Court of the United States for the District of Virginia, against the complainants in this suit, on said bond, Simpkins in the meantime having died insolvent.

The complainants employed counsel to defend said suit, and to appear and cause their names to be entered upon the docket, and upon whom the complainant relied to plead and make the defence to the said suit at law.

Upon the trial the said counsel, although regular practitioners at that bar, were not present, and the complainants did not know of the said trial, nor that a judgment was rendered in said cause, until long after the said judgment had become final and absolute.

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In June, 1872, an act of Congress was passed for the relief of Simpkins's sureties, authorizing the Attorney-General to demand and receive from the State of Virginia the amount so deposited, and the Attorney-General was also authorized to stay proceedings on the said judgments until it was ascertained whether Virginia would make payment of said deposit.

Subsequently, and on April 3d, 1873, the agent of the Attorney-General demanded such payment of the State of Virginia, but the demand was refused on the ground that such payment was forbidden by the constitution of the State.

On the 29th of April, 1873, the complainants, as required by the said act, delivered to David B. Parker a forthcoming bond, in the sum of \$20,180, to satisfy the amount of the said judgment of \$11,795, with costs and interest.

The only consideration for the said forthcoming bond was the said judgment against them as Simpkins's sureties.

No part of the money which that judgment represented was lost, or squandered, or embezzled by Simpkins.

No part of that fund has ever come into the possession of either of the persons against whom the judgment runs.

They are chargeable with no fault or neglect, and have in no way contributed to produce either the loss or peril in which the money is placed.

The judgment was not only recovered against them without any fault or neglect on their part, but neither one nor all of the attorneys or counsel so employed by them, and relied upon to make their defence, are able to pay the amount of the judgment or to indemnify the complainants against the same, wherefore they pray a perpetual injunction against the said party from attempting to enforce the said forthcoming bond. All parties are citizens of Virginia.

The bill was brought against D. B. Parker, as Marshal of the United States for the Eastern District of Virginia. After it was commenced Parker resigned, and C. P. Ramsdell, his successor, was made, by order of court, defendant in his place.

To the bill the defendant, C. P. Ramsdell, interposed a general demurrer, and made affidavit to it in usual form.

Argument for complainants.

The defendant's statement of his grounds of demurrer, submitted by *L. L. Lewis*, U. S. Attorney, were as follows:

1st. Because, as shown on the face of the bill, the complainants had their day on the law side of this court; that judgment in the matter was rendered against them, fairly and *bona fide*, and that if any wrong has been done said complainants, it arises from their own fault and neglect, as shown by their said bill itself.

2d. Because the defence set up in said bill is neither at law nor in equity a sufficient answer to the demands of the United States against them and their principal, the late Jesse J. Simpkins.

3d. Because, even admitting the defence as set up in said bill to be sufficient (which this defendant does not), it does not appear from the statements contained in said bill that the complainants did not have ample opportunity to have applied to the court wherein said judgment was rendered, to set aside the verdict, and to grant them a new trial.

H. H. Wells, counsel for complainants, insisted in argument:

The application for injunction in this case does not depend upon the citizenship of the parties, but upon the fact that the proceeding is in the same court in which the judgment was rendered, and is ancillary to the original suit.

Dunn v. Clark, 8 Pet., 1; *Christmas v. Russell*, 14 Wall., 69, as to what is ancillary; *Jones v. Andrews*, 10 Wall., 327; *Dunlap v. Stetson*, 4 Mason, 349; *Freeman v. Howe*, 24 How., 450; *Clark v. Matthews*, 12 Pet., 170; see brief in *Fant v. Stewart*, in this court; *St. Luke's Hospital v. Bradley*; 3 Blatch, 259.

The general rule is that equity will enjoin judgments which are against good conscience, and which can be impeached by facts or grounds which the party could not avail himself of at law, or of which he was prevented from availing himself by *fraud, accident, or mistake, without any negligence or fraud on his part.*

Hilliard on Injunctions, p. 154, ed. of 1865; *Marine Ins. Co. of Alexandria v. Hodgson*, 7 C., 332; Daniell's Chan. Prac.,

Argument for complainants.

p. 1725, and cases there cited; *Holland and wife v. Trotter*, 22 Gratt., 136, 41-4, a very strong case.

No judgment could be more inequitable than the judgment in this case. The sureties were held liable upon a cause of action for which the principal, if living, would not have been liable for money taken from him by a military force of the confederate States. The bill sets these facts out fully, and in Thompson's case, 15 Wall., 337, the court decided, not only that the confederate States were public enemies, but that a collector or receiver of public money, under bonds to keep it safely and to pay it when required, is not bound to render the money at all events, but is excused if prevented from rendering it by the act of God or a public enemy without any neglect or fraud on his part.

Up to this point there probably would be no dispute or discussion. The real question of difficulty, greater or less, is whether the complainants have lost their right to equitable relief by fault or negligence, and the only possible fault or negligence to be imputed to them is that they did not present that defence at the trial on the common law side of the court.

They did, however, and the bill so avers, employ counsel in good and regular standing to defend the suit, who caused their names to be entered on the docket, but they were not present at the trial, and neither they nor the defendants in that suit knew of the trial until the end of the term at which it was had.

The bill further avers, and it is true, that the counsel were not pecuniarily responsible, and are unable to pay the amount of the judgment or to indemnify the complainants in this case.

In this condition of the case we maintain that all imputable laches are explained and excused, and that the complainants are entitled to the same relief, founded upon the facts alleged, that they would have been entitled to if these facts had been well pleaded and established on the trial, or had not been discussed until after the trial. See *Mosby v. Haskins*, 4 Hen. and Munf., 427.

The bill was for injunction to relieve against a judgment under these circumstances. The complainant had no knowledge of the suit at law until after the judgment was obtained. He presumed when the writ was served upon him that it was in a

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chancery suit, brought to subject the estate of his ward. Injunction granted.

In *Marine Ins. Co. v. Hodgson*, cited above, the court say, "A court of chancery being capable of imposing its own terms upon a party to whom it grants relief, there may be cases in which its relief ought to be granted to a person who might have defended, but omitted to defend himself at law."

In *Smith v. Balch*, 40 N. H., 363, where an attorney brought a suit without any authority for the plaintiff, and the defendant obtained a judgment for costs, it was held "a court of equity will restrain the enforcing of such a judgment by a perpetual injunction, if it be shown that the counsel is poor and unable to respond."

The language of the court in that case was: "The want of authority and ability being established, we are of opinion that the plaintiffs are entitled to relief upon the authority of numerous cases. A perpetual injunction should therefore issue."

When, by the neglect of an attorney of good reputation, a party has been defaulted, the court will enjoin the judgment, if, on discovering the default, he applies for redress. In such case he is not guilty of laches, and certainly he will be relieved when the attorney is insolvent. *Heubeschman v. Baker*, 7 Wis., 542, cited in *Hilliard on Injunctions*, 177; *Demlon v. Noyes*, 6 Johnson, 300.

Where a judgment has been obtained by default through mistake, without laches, and manifest injustice will be done, a suit in equity to set it aside can be maintained after the expiration of the term whereby the right to open the judgment by motion was lost. This is a strong case. Mr. Justice Field united in the judgment. *Bibend v. Crutz*, 20 Cal., 109.

If an attorney appears for a defendant, even without authority, and a judgment passes against him, it will not be enjoined, unless it is shown that the attorney is not of sufficient ability to answer the demand. *Bunton v. Lyford*, 37 N. H., 512.

HUGHES, J.—Jesse J. Simpkins, at the outbreak of the war, was collector of customs at the port of Norfolk. The complainants were sureties on his official bond. In the month of Janu-

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ary, 1871, the United States obtained a judgment in this court on the bond for \$11,795.58, which has never been satisfied.

The bill prays for an injunction to restrain all proceedings under the said judgment to collect it, and the prayer of the bill is based on two grounds: 1. That said judgment was rendered in the absence of the complainants and of their counsel, who had been employed to defend the action, and *who had entered an appearance in the action*, and that its rendition did not come to the knowledge of the complainants or to their counsel until the same had become absolute. That the counsel thus employed is insolvent, and unable to respond in damages should a judgment be obtained by complainants against him for his neglect of duty in not defending said action.

There is no more fully settled principle of equity jurisprudence than that a party who has had "his day in court," and against whom judgment has been rendered at law, is not entitled to the interference of a court of equity by granting an injunction to the judgment, unless it be clearly shown that it would be inequitable and "against good conscience" to enforce said judgment, and that the same was rendered without default or negligence on the part of the defendants or their agents. No case can be cited where the contrary has been held, while in favor of the proposition as laid down, a long train of decisions of the highest courts in this country and in England can be adduced.

"It is to the interest of the republic that there be an end of suits." Parties, therefore, will not be allowed to relitigate in a court of equity matters passed upon by a court of law, and to which opportunity was afforded to appear and make defence. If it were otherwise, there would literally be *no end of litigation*, and litigious persons would be encouraged to neglect their causes at law, by an assurance that a ready ear would be lent by courts of equity to their applications to reopen the controversy. This would not only be against public policy, as tending to *prolong*, instead of ending, litigation, but would work manifest injustice to those suitors whose causes, not yet litigated, are awaiting hearing.

It is unnecessary, however, to enlarge upon a principle so very often expressed by the ablest judges this country has produced.

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The leading case upon the subject in this country is the case of *The Marine Insurance Company of Alexandria v. Hodgson*, 7 Cranch, 333. In that case Chief Justice Marshall, in delivering the opinion of the court, says (p. 336): "It may safely be said that any fact which *clearly proves it to be against conscience* to execute a judgment, and of which the injured party *could not* have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, *unmixed with any fault or negligence in himself or his agents*, will justify an application to a court of chancery. On the other hand, it may with equal certainty be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly set up at law, although it may be the opinion of that court that *the defence ought to have been sustained at law*." In this case the complainants sought relief "from a judgment, on account of a defence which, if good anywhere, was good at law, and which they were *not prevented by the act of the defendants*, or by any pure and unmixed accident, from making at law" (pp. 336-7). See also *Foster v. Wood*, 6 Johns. Ch. Rep., 89.

In the case of *Truly v. Wanzer*, 5 Howard, 142, the complainants prayed a perpetual injunction to a judgment at law, on the ground that the contract upon which the judgment was rendered was illegal. But the Supreme Court said: "Even if the alleged illegality of the contract would have constituted an available defence to the payment of the note, it would be a strange abuse of the functions of a court of equity to grant an injunction against enforcing a judgment at law because a purchaser, with a full knowledge of his defence, had omitted to urge it" (p. 142).

In the case of *Creath's Administrator v. Sims*, 5 Howard, 356, the complainants prayed an injunction to a judgment at law, on the ground, among others, that the contract upon which judgment was obtained was illegal, and that "the judgment was in fraud of the defendant's rights." In the course of the opinion of the Supreme Court, the following language is used: "Whenever a competent remedy or defence shall have existed at law, the party who may *have neglected to use it* will never be permitted here (in a court of equity) to supply the omission, to the en-

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couragement of useless and expensive litigation, and perhaps to the subversion of justice."

It has been held in Arkansas that "a judgment at law will not be enjoined merely on account of *the negligence*, unaccompanied by fraudulent combination or connivance, *of the defendant's attorney*." *Wynn v. Wilson*, Hempst., 698.

The law upon the subject has been very clearly laid down in a number of cases by the Virginia Court of Appeals, and especially in two recent decisions by that court. In the case of *Enquirer Company v. Robinson et als.*, 24 Gratt., 548, it is held that "equity will only relieve against a judgment at law, if the omission of the defendant to avail himself of his defence at law was unmixed with any negligence in himself or *his agents*." In the same case, at page 552, the court says: "This rule is absolutely inflexible, and cannot be violated, even when the judgment is manifestly wrong in law or fact, or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third person."

In the case of *Wallace v. Richmond, Assignee*, a case like this, in which relief from a judgment at law was prayed for, on the ground of the negligence of defendant's attorney in not pleading and making defence at law, and in which the facts seem to be stronger in favor of complainant than in the case at bar, the Virginia Court of Appeals refused to grant the relief prayed for, and affirmed the decree of the court below dismissing the bill. 26 Gratt., 67.

See all the authorities upon the subject referred to and commented upon in 2d volume L. Cases in Equity, 1335, etc. "A party cannot have relief in equity because he has lost the benefit of a good defence in consequence of the ignorance, mistake, or *negligence of his attorney*, however clearly it may appear that a cause was sacrificed which might have been successfully defended." L. C. in Equity, p. 1335, and cases there cited.

From these authorities it will appear that the mere fact of the insolvency of the agent by whose neglect the judgment at law complained of was rendered will not suffice to give jurisdiction to a court of equity to grant an injunction. And the reason is

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obvious. Parties can select whom they please as counsel. If they, therefore, choose to retain a negligent attorney, who is at the same time insolvent and unable to respond in damages for his neglect, they have no one but themselves to blame for their choice and its consequences.

The case of *Holland and Wife v. Trotter*, 22 Gratt., 136, is not an authority in this case. There the defendant at law was prevented from employing counsel and making defence to the action in consequence of the promises and representations made to him by the plaintiff's attorney, who induced him to believe that the plaintiff would abandon the suit, and that it would therefore be unnecessary for him (the defendant) to make defence or trouble himself further about the matter. Notwithstanding, judgment was afterwards, without notice or retraction of these promises, rendered against him. To have held otherwise, would have been a shock to all sense of propriety and fair dealing. It would have been judicially declaring the plaintiff entitled to the fruits of his fraud upon an innocent party. Such is not this case. The bill contains no allegation of imposition or fraud practiced upon the complainants by the attorney of the United States who obtained the judgment, and who now, as attorney for the complainants, seeks to have it perpetually enjoined. See also the decisions in *Scott v. Hore* and *In re Ferguson*, reported elsewhere in this volume.

2: As to the second ground upon which relief is prayed for in this case.

It is alleged in the bill that the commander of the confederate forces at Norfolk, in 1861, demanded of the collector the moneys of the United States in his hands, and that there was at hand an ample force to compel obedience to the demand. Nevertheless no *attempt to use force was made, or even threatened*, to compel the payment of the money, and the collector himself did substantially what General Huger required, viz., surrendered the fund to a hostile government at war with the United States, to wit, the *de facto* State government at Richmond. It thus appears that no steps were taken to enforce the demand of General Huger, and that, therefore, the question of "*forcible seizure*" does not arise in this case, as in the case of *United*

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States v. Thomas, 15 Wall., 341, upon which the complainants' counsel relies. Moreover, in the case just referred to stress is laid by the court on the fact that Thomas, the surveyor of customs at Nashville, and the principal defendant, was shown to have been *loyal*, and not one of the insurrectionists willingly co-operating with the public enemies. No such allegation is made with respect to Simpkins, and the presumption is the other way. This case, therefore, comes strictly within the rule laid down by the Supreme Court in the case of *United States v. Keiler*, 9 Wall., 87, and the demurrer to the bill must be sustained.

Circuit Court of the United States for the Eastern District of Virginia, at Norfolk, May Term, 1877.

GEORGE L. BOWDEN, RECEIVER FIRST NATIONAL BANK OF
NORFOLK, v. C. A. SANTOS *et al.*

SAME v. W. H. TURNER *et al.*

The transfer of shares of the capital stock of a national bank, made with intent to exonerate the owner and transferrer from liability as a stockholder to creditors, is void as against creditors of the bank.

IN equity.

These two cases are so nearly alike that it is only necessary to consider one of them, which will be the one first named.

This was a bill in chancery filed by the plaintiff as receiver of the First National Bank of Norfolk, to enforce the personal liability of the defendant, Santos, as the owner of thirty-nine shares of the capital stock of the said bank. On the 26th day of May, 1874, the bank suspended, and on the 3d day of June of that year the plaintiff was appointed its receiver by the Comptroller of the Currency, in pursuance of the provisions of the National Banking Act.

L. L. Lewis for the plaintiff.

Baker & Walke and W. H. C. Ellis for defendants.

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HUGHES, J.—The bill in this case is filed to set aside certain transfers of the shares of the capital stock of the First National Bank of Norfolk (of which the plaintiff is receiver) made by the defendant, Santos, to the defendants, Lamb and Williams, a few days before the suspension of the bank, in May, 1874. It also prays that Santos may be decreed to pay to the plaintiff the par value of the shares thus transferred.

As to the facts, the bank suspended on the 26th day of May, 1874, and is utterly insolvent. The defendants, Santos and Lamb, at the time of its suspension were directors, and for a long time prior thereto had been officers of the bank. The defendant, Lamb, was president up to a short time before its suspension. For some time before that event the bank had been in a critical condition, and it had been evident to the officers that its "suspension was a mere question of time." The defendant, Santos, aware of the condition of the bank (it was the subject of frequent discussion by the directors), and anxious to relieve himself of liability as the holder of the stock in question, transferred in due form, on the books of the bank to Lamb, nineteen of his shares on the 16th May, and his remaining twenty shares to Williams on the 21st day of May, 1874.

At the time of these transfers both Lamb and Williams were insolvent, and have ever since been unable to respond to the demands of the creditors on account of these shares. At the time of these transfers there were already standing in the name of Lamb on the books of the bank over 200 shares of its capital stock. The receiver has been unable to make anything out of either Lamb or Williams on account of their liabilities to the bank.

On the other hand, Santos, at the time of these transfers, was, and is, a man of high standing and credit in business circles, and of large means.

In his answer it is averred by Santos that the transfer of the shares was a *bona fide* transaction, and for valuable consideration; but the allegation in the bill that Williams was insolvent, and unable to respond to the demands of the creditors on account of these shares, is not denied. It is abundantly established by the

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evidence in the case that the transfers were made to exonerate the defendant, Santos, from his liability as a stockholder.

In his answer, Santos declares that he was never the purchaser or owner of the nineteen shares transferred to Lamb. And yet the testimony shows that he executed his note (which he has since been requested to pay) for these shares, and that they stood in his name on the books of the bank for a considerable number of months before he transferred them to Lamb.

The defence set up that these shares were formerly bought in by Lamb for account of the bank, and that it was agreed between them that if Lamb, acting for the bank, would buy the shares for the bank, he might place them in Santos's name, provided he would indemnify him, *i. e.*, take a transfer of the shares when it should be desired by Santos, is invalid. Under the provisions of the National Currency Act (Rev. Stats., sec. 5201) a national bank is prohibited from purchasing or holding its own shares. What is forbidden to be done directly the law does not allow to be done indirectly. Consequently the promise on the part of Lamb to take the shares when requested, if it could be sustained on any ground under the circumstances of this case, certainly cannot be sustained on the ground upon which it is placed in the answer. It is founded upon an illegal agreement, and the case comes strictly within the ruling of the judges in the case of *Ex parte Walker*, 39 English L. & Eq. Reports, p. 579.

Plain as these facts are, they are no plainer than the law of the case.

Indeed, there is no serious defence set up against the prayers of the bill, except the technical one that a bill does not lie, no discovery being sought, and there being adequate remedy at law. Counsel for defence rely, as to the doctrine that there is no such thing as fraud *per se*, on *Davis v. Turner*, 4 Rand., 422, and as to jurisdiction of equity where no discovery is sought, on *Home Ins. Co. v. Stanfield*, 1 Dill., 424, and *Medyl v. Mayes*, 6 Rand., 658.

But this is a case of trust, and equity has jurisdiction in all matters of trust.

That the capital stock of an incorporated company is a trust

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fund for the payment of the debts, and is required by courts of equity to be honestly and faithfully guarded and handled, is settled by very many decisions of the courts of this country. I refer only to *Wood v. Dummer*, 3 Mason, 308; *Upton, Assignee*, v. *Tribilock*, 1 Otto, 47; *Sanger v. Upton, Assignee*, Id. 60; *Webster v. Upton, Assignee*, Id. 71; *Nathan, Receiver*, v. *Whitlock*, 9 Paige (N. Y.), 159; 6 Paige, 337. See also 2 Story's Equity, s. 1252.

Any contract, especially among the officers of an incorporated company, involving the withdrawal of any portion of the capital stock from the reach of creditors, will not be tolerated by a court of equity. 6 Paige, 337; *Ex parte Bennett*, 27 Eng. L. and Eq. Reports, 572; *Ex parte Walker*, Id. 576, etc.

In the case of *Nathan, Receiver*, v. *Whitlock*, 9 Paige, 159, the defendant, Whitlock, who had been a *director* of the company, transferred his stock to Brown, the president of the company, the latter giving his note, in place of Whitlock's, for the stock transferred. The company afterwards failing, and Brown being insolvent, the receiver was allowed to recover of Whitlock the amount of his shares transferred to Brown. The court held the transfer of the stock to be a fraud upon the rights of the creditors, and ineffectual to relieve Whitlock of his liability, and that Whitlock, having been a director of the company, must be presumed to have known its situation, and had no right to shift from himself to an irresponsible person the liabilities of a holder of the capital stock transferred.

In *Upton, Assignee*, v. *Tribilock*, 1 Otto, 47, the Supreme Court says: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a *trust fund*, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts."

Again, in the case of *Sanger v. Upton, Assignee*, 1 Otto, 60, the law is laid down as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its

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debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied."

Again, in the case of *Webster v. Upton, Assignee*, is it said (p. 71, 1 Otto): "The whole subscribed capital stock of a corporation is a trust fund for the payment of creditors when the corporation becomes insolvent. . . . The stock cannot be released, *i. e.*, the liabilities of the stockholders cannot be discharged, to the injury of creditors, without payment."

In *Angell & Ames on Corporations* (10th ed.), s. 535, it is said that a solvent stockholder, who has given a stock note for his stock, cannot, upon the insolvency of the company, or in contemplation of that event, even with the consent of the directors, transfer his stock to an irresponsible person, and be discharged from liability. So, at s. 623, it is said that, however strictly the personal responsibility imposed upon members of an incorporated company may be construed to be against creditors, one point is very clear, and that is, that no member can exonerate himself from his liability, and defeat the claims of creditors, by transferring his stock to a bankrupt.

Any other doctrine is offensive to the plainest and best settled principles of morality and equity. A man is estopped to deny the truth of his admissions that have been acted upon by others. "He who is silent when he ought to speak will not be heard when he ought to remain silent." So, as Mr. Santos silently sat by and saw innocent persons contracting with the First National Bank of Norfolk, perhaps on the strength of his name appearing on the stock list of the bank, he will not be heard in a court of equity to say, against the just demands of creditors, that "he was never the purchaser or owner of the stock transferred as aforesaid."

The ground of the equitable liability of the members is the credit which the company has gained, as a corporation, on the promise of the individual members to raise a fund to enable the corporation to fulfil its engagements. *Angell & Ames on Corporations* (10th ed.), s. 603.

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To the same effect many authorities might be cited, but it is confidently believed that sufficient has been adduced to establish the conclusion that the transfers of the stock made by Mr. Santos were illegal and void, and that, consequently, the defendant, Santos, must be held liable for the par value of the thirty-nine shares of stock transferred to his co-defendants.

I will sign a decree requiring the defendants, or either of them, to pay the par value of the shares held by Santos before their transfer, with costs.

In the Circuit Court of the United States, for the Eastern District of Virginia, at Alexandria, July, 1875.

ELIZABETH D. SCOTT v. ELIAS A. W. HORE.

A decree taken by default in consequence of the neglect of counsel for the defendant, will not be opened on motion for rehearing.

The Virginia law, settled by repeated decisions of the Court of Appeals, that a rehearing for neglect of counsel will not be granted, and never except on a bill of injunction, is observed in the United States Circuit Court for this district.

United States circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.

The 88th Rule in equity, forbidding a United States circuit court, on motion, to grant a rehearing, after the term, of final decrees to which appeal lies to the Supreme Court, is imperative.

What is a final decree?

IN equity.

Some time previously to 1849, Richard M. Scott, of Stafford County, Virginia, devised his St. Marysville plantation in that county to trustees for the benefit of his eldest son during his life; and after his death, to Eliza Scott, wife of the devisor, for her life; charging the estate with a small annual rent per annum for the benefit of his heirs. He afterwards died. The son also died, leaving Virginia Scott his widow, and a son, Richard M. Scott, Jr. This Richard M. Scott, Jr., in the course of time, August, 1850, made a contract (called a lease by the contracting parties) with his grandmother, Eliza

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Scott, by which he covenanted and agreed to pay her an annuity of \$700 (called rent by the parties) for the surrender of her life interest in St. Marysville. This contract was in writing in the nature of an agreement, and the Virginia Court of Appeals, in passing afterwards upon the transaction, decided that "though the instrument was called a lease, and the sum reserved was called a rent, the contract was a surrender, and the life estate of Eliza Scott was merged in the estate of Richard M. Scott, Jr.;" and furthermore, that "the instrument not being under seal, it was not an express surrender, but it was a contract for a surrender which was carried out by the parties, by the delivery of possession and the payment of money under it, and it therefore had all the legal effect of an express surrender by deceased." The acting trustee as party to this contract was afterwards relieved by the court from service under it. After the making of this contract, and the delivery of possession to Richard M. Scott, Jr., this Scott died, and his estate passed to his mother, Virginia Scott, his executrix. In the year 1870, Virginia Scott, who seems to have had possession and full title to the land (charged, it may be, with the covenants of Richard M. Scott, her testator, from whom she probably inherited as heir), without express notice to the grantee, sold or conveyed by deed of bargain and sale to Elias A. W. Hore the St. Marysville plantation. During the civil war of 1861-5, the records of Stafford County were burnt or destroyed, and there was probably no record notice to Hore of the title of St. Marysville, or of the charge running with the land (if it were such) which had been fixed upon this estate by the covenant of Richard M. Scott, Jr.

Hore has remained in possession ever since, and is still in possession. In the fall of 1873, Mrs. Elizabeth Scott, having become a resident of Indiana, filed her bill in chancery against Hore in this court at Richmond, setting forth the facts, some of which have been recited, and praying that Hore, the holder of the land, should be required to pay to her such of the \$700 annuities as were in arrear (some three or four of them), and be decreed to pay the future annuities as they should become due. On being served with process, Hore went to Richmond, and employed counsel for his defence, but there is no allegation that he fur-

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nished his counsel with his grounds of defence. At the December rules, 1873, there was a rule *nisi*. At the January rules, 1874, there was an entry *pro confesso*; and at the Spring term of the court, on the 9th of April, which was the fifth day of the term, no answer having been filed, and no defence been made, and no counsel marked for Hore on the docket, a decree was taken by default.

This decree was a full adjudication of all the principles of law involved in the case, and a careful provision for all the contingencies that might arise in the course of executing it. It decreed against Hore to Mrs. Scott the annuities that were in arrear, directed that execution might issue for the amount; decreed that the future annuities should be paid as they should accrue; and provided that if the execution which it directed to issue should be returned no effects, then the land should be sold. In such event the decree appointed a commissioner to make sale, and prescribed all the proper rules and conditions which he should observe in making the sale. It furthermore adjudged costs to the complainant, and declared expressly that it was a final decree.

No notice was taken of this decree by Hore during the Spring term, 1874, of the court. No notice was taken of it by him during the regular session of the Fall term of the court, in October, 1874. But at an adjourned term held for special purposes, in 1875, at Richmond, the defendant, Hore, by counsel, moved the court for a rehearing of the cause, on the ground that his counsel had neglected to make defence. At another adjourned term of the court, held at Alexandria, May 17th, 1875, the motion was argued, and a paper filed informally in the nature of an answer to the original bill of Mrs. Eliza Scott.

HUGHES, J.—I am to decide, upon the foregoing facts, whether this motion for a rehearing of the cause can be granted, and whether the decree of this court, entered on the 9th of April, 1874, can be set aside on such motion.

I think it is now settled law in Virginia, notwithstanding the remarks of the court in 9 Leigh, 289, on the case of *Patterson v. Campbell*, never reported, that a judgment or decree, rendered

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by default, cannot be opened on the ground of the negligence of counsel. In *Hill et als. v. Bowyer et als.*, 18 Gratt., 382-6, the Court of Appeals says: "A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with employing a lawyer who practices in the court to defend him without giving any information about his defence, or inquiring whether he is attending to the case, is not entitled to relief on the ground of surprise, however grossly unjust the decree may be." For other decisions of the court on this point, see 9 Leigh, 478; 10 Gratt., 506; 22 Gratt., 136; and *Wallace v. Richmond, Assignee*, to be reported in 25 Gratt. It is also to be gathered from these cases that the proceeding proper to be employed in applications for opening judgments or decrees taken on default through negligence of counsel, is not that by motion for a rehearing, but by bill in chancery. Under the Virginia law, this application by motion cannot be sustained at all; and the decisions are against it even though made by bill.

If this motion depended alone upon the law as settled in Virginia for the courts of the State, I should feel bound to deny it on the grounds—1st. That negligence of counsel is in Virginia no ground for opening a judgment or decree; and, 2d. That even though in extreme cases it be so, yet the proper mode of proceeding for defendant is by bill of injunction and not by motion.

But behind these reasons, which forbid a rehearing of this case, on motion, there is another objection to it more insurmountable than the rest.

The 88th Rule of the Supreme Court of the United States, prescribed for proceedings in chancery in the inferior courts, forbids the rehearing of a cause after the term at which the final decree of the court shall have been entered and rendered, if an appeal lies to the Supreme Court. The Spring term and the Fall term for 1874 of this court had both passed before this motion was entered. The general decisions of the courts of England and the States of America, many of which have been cited in argument, can have no force in this court in opposition to such a rule. We are bound here by the Rule 88. The very fact of there having been a diversity of rulings on this subject by other courts, was

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probably the inducement which led the Supreme Court to lay down its Rule 88. That Rule is the law here, whatever may be the rulings of other courts of the highest authority on this subject. The Supreme Court has not only laid down its Rule 88, but in the cases of *Cameron v. McRoberts*, 3 Wheat., 591, and *McMicken v. Perrin*, 18 Howard, 507, it has construed that rule and decided that circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.

If the decree of 9th April, 1874, was a final decree, and if an appeal lies from it to the Supreme Court, then I am not at liberty to grant a rehearing. If it is a final decree, then an appeal does lie to the Supreme Court, because the amount involved exceeds two thousand dollars, the sum then requisite to give jurisdiction of an appeal to that court. The only inquiry therefore is, whether the decree in question was a final decree.

It has been truly said in argument that there are two classes of decisions by appellate courts with reference to this character of finality in decrees: 1st, those in which it is necessary to determine whether an appeal lies; and 2d, those in which a limitation of time for an appeal cuts off the right. In the first class of cases the courts go farther to construe a decree as final than they do in the last class of cases; in each class aiming to preserve to the suitor this valuable right. A court will, when no limitation of time occurs, strain a point to treat a decree as final from which an appeal has been taken; and in the other case it will strain a point to treat a decree as not final where an appeal would be cut off by limitation. Hence has arisen a diversity of decisions on this question, all made in the interest of the suitor's right of appeal.

I admit the difficulty of defining a final decree in such precise terms as will hold good in all cases. I have been in the habit of thinking those decrees to be final which determine all the principles of law and equity arising in a case, and which give direction for carrying the principles so decided into execution. If decrees which are made after all evidence is taken, and full and final argument heard, and which determine all questions raised, do not go on to provide for carrying into complete execu-

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tion the principles decided, they are in that respect defective. They are final decrees, though as such they may be defective in their ministerial parts. The Supreme Court of the United States has not unfrequently complained of district and circuit courts for not entering complete final decrees, and of their carrying into execution by piecemeal decisions which finally settle all questions arising in causes. The difficulty of defining what are final decrees has arisen chiefly from the fact that decrees really final in character have been defective in providing fully for the ministerial measures to be taken by officers of the court in carrying them into execution. Of course it would be exceedingly empirical to hold that a *final* decree is the order entered *last* in point of time, in a cause. A final decree is one which finally adjudicates the questions of right and of law involved in a cause, and proceeds to provide with reasonable completeness for the execution of such measures as may be necessary and proper for placing successful suitors in possession of the rights decreed to them.

The decree now under consideration is final, in my judgment, not only in its express terms, but in its subject-matter. Being a final decree, and one from which an appeal may be taken to the Supreme Court, it cannot be opened now on a motion for rehearing. The only possible method by which it can be re-examined in this court is upon bill of review. If such a bill is not brought, there is no way of staying the execution of it other than by appeal.

The motion of the defendant is denied.

*United States Circuit Court, Eastern District of Virginia, at
Alexandria, March, 1877.*

**ALEXANDER HAY v. THE ALEXANDRIA AND WASHINGTON
RAILROAD COMPANY.**

The complainant had purchased all existing judgments against the defendant railroad company; and afterwards purchased all the company's property sold under a trust deed junior to the judgment liens; and then

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marked as *satisfied* the judgments he held, on the proper dockets. In a subsequent litigation the deed of trust and his purchase under it were adjudicated to be illegal and void. He thereupon filed a bill in chancery against the company, praying that his *satisfaction* marked against the judgments might be set aside, that the defendant be decreed to pay the judgments, and that he might have general relief.

A demurrer to this bill, on the ground that he had full remedy at law, and that therefore a bill in equity did not lie, was *overruled*.

IN chancery.

H. H. Wells appeared for the complainant; and S. Ferguson Beach for the defendant.

The complainant had purchased sundry judgments, which were all that were outstanding, against the defendant company, which were duly recorded on the judgment docket in the proper clerk's office designated by the laws of Virginia. These judgments were superior to a deed of trust subsequently executed upon the property of the company.

With the purpose of reorganizing the company on a new basis, the complainant afterwards purchased all its property at a sale made by the trustees under the deed of trust. Having thus become sole owner by this purchase, he made in writing a memorandum on the proper record in the proper office of the court, declaring that the judgments which he had purchased were *satisfied*. He did this in full faith that the sale to him under the deed and his title by purchase were valid.

This deed and sale were afterwards attacked, and, after a course of litigation, were pronounced by the Supreme Court of the United States invalid and null.

The complainant now brings his bill in equity, reciting in detail the facts just set forth, and praying that the *satisfaction* entered upon the judgments which he had purchased be set aside; that the defendant be adjudged and decreed to pay him the amounts of the judgments with interest; that the judgments be decreed to be a lien upon the property of the defendant, as of the date when the *satisfaction* was entered; and that other and further relief be granted as the nature of his case requires.

To this bill a general demurrer was interposed; the demur-

rant insisting, generally, that there was no jurisdiction in equity, because the complainant had full and compact remedy by action at law against the company.

HUGHES, J.—The only remedies at law are, action upon the judgment, *scire facias* to revive the judgment, issuing execution thereon, and motion to set aside the satisfaction.

In regard to the first three remedies, the plaintiff would be met with the record of satisfaction, and this being a matter of record could not be avoided by pleading at law.

“There can be no averment in pleading against the validity of a record, though there may be against its operation.” Chitty’s Pleadings, 481, 354; *Biddle v. Wilkins*, 1 Peters, 692.

It needs no citations of authority to support the proposition, that a record cannot be revised or contradicted by parol proof.

It is not competent in an action *at law* on a specialty, for the defendant to avoid it by pleading that it was obtained by fraudulent misrepresentations made by the plaintiff. 2 Rand., 426; *Taylor v. King*, 6 Mumford, 358. Certainly a record stands upon as high a ground as a specialty.

As to actions on contracts, this rule has been changed by special statute in Virginia, but such statute does not affect a record.

A motion may be made to quash an execution because a court has control over its own process, but a motion to set aside a *satisfaction* is entirely different. Such a record is not the action of the court, but of the party alone.

But even on a motion to quash an *execution if it involves the question whether satisfaction is properly entered, it is a case proper for a court of equity*. In *Crawford v. Thurmond*, 3 Leigh, 85, when an execution had been indorsed for the benefit of Crawford by Shroder, the owner of the judgment, and the judgment was satisfied of record by Shroder, a bill was filed in equity by the debtor to enjoin the execution. It was objected that there was an adequate remedy at law by motion to quash. The court says, page 88: “Now I do not say that the County Court sitting as a court of law, *could* not upon motion in a summary way try these questions; but I do say, that in that mode it could

not have afforded a safe or available tribunal for the trial of them, as a court of equity upon regular pleadings and proofs.

"And this consideration, it will be recollected, forms one of the grounds of equity jurisdiction. But there is another and perhaps stronger ground. The indorsement of the execution for Crawford's benefit gave him nothing but an equitable right, which could have no weight in a court of law, belonged exclusively to a court of equity, and must finally have brought the cause there for a decision.

"It must be seen in the case at bar, that the questions involved are of such a nature as could not be tried *summarily* upon motion, certainly in not as safe and available a manner as in a court of equity. Besides, as to two of the judgments, the complainant has only an equitable right.

"The satisfaction entered on record must, as to all parties who stand in the situation of innocent purchasers for a valuable consideration, be deemed valid and effectual." 1 John. R., 560.

The judgment is not merely an evidence of indebtedness. It is a security upon the property, and to preserve this security the complainant is entitled to have the record of satisfaction annulled.

This cannot be done by a court of law. In *Wardell v. Eden*, 2 John., case 121, the Supreme Court of New York set aside the satisfaction of a judgment obtained therein, *upon motion*; but there was no question of fact involved in the case, and no necessity for such an examination of facts as would require the machinery of a court of equity.

In *Beebee v. Bank of New York*, 1 John. R., 550, in considering the effect of such action as to subsequent creditors, the Court of Errors says: "The Supreme Court, in vacating the satisfaction of the judgment in *Wardell v. Eden*, exercised a jurisdiction until very recently within the acknowledged province of a court of equity alone."

In *Philips v. Larriere*, 11 Meeson & Welby, 84, the court says, "A court of law has no jurisdiction to set aside a release which is good in law."

The act of Congress relating to the jurisdiction of a court of equity is but declaratory of the then existing rule, and re-

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course is to be had to the principles of English equity, not to the laws of the State. (Cases in Brightly's Fed. Digest., 283.)

In order to oust the jurisdiction, the remedy must be as plain, adequate, and complete at law as in equity. 19 How., 312; 3 Peters, 210; 15 How., 415; 1 Story, Eq. Juris., sec. 33; *Olricks v. Spain*, 15 Wall., 221.

The fact that the State laws give a legal remedy upon an equitable title does not oust the jurisdiction of the United States Circuit Court. (Bright. Fed. Digest, 283.)

The demurrer is overruled.

*United States Circuit Court, Eastern District of Virginia, at
Alexandria, January, 1875.*

TURNBULL & CO. v. THOMAS *et als*.

Where the maker of a promissory note, which is in printed form, by mistake, signs his name above the printed line stating the bank at which the note is payable, *held*, that the printed line below the signature is nevertheless part of the note, and that the note is therefore negotiable, especially where it has coupons of interest attached, and is indorsed in that form, these circumstances precluding all doubt of the fact that the designation of the place of payment was on the note when it was executed.

Where an agreement in writing is made between parties, by which it is stipulated that the one shall secure the other by trust deed to the amount of sixty thousand dollars, and the trust deed afterwards actually mentioned thirty thousand dollars as the amount received, *held*, that the deed was a lien only for thirty thousand dollars.

Where agents of a manufacturer, in the course of transactions running through years, in which they make sales for him to large amounts and also make advances to him in the course of their business, have taken up notes of the manufacturer at maturity, and charged them in their account current, *held*, that the agents are not entitled to claim the benefit of a mortgage given to secure these and other notes, because these notes must be considered as having been paid at maturity by the maker.

Where an agent of a manufacturer who is in advance to his employer, and needs funds, and has no way of paying himself except by using notes of the manufacturer, which he is authorized to sell in the course of business, one day before the maturity of such notes passes them *bona fide* to

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one of his own creditors, who, in consideration of them, cancels a security held against the agent, *held*, that this was not a payment of the notes by the maker of them (the employer), and that this creditor of the agent is a *bona fide* purchaser, without notice of any equities, if any, which may exist between an agent and his employer.

Example of equity practice under Rule 60, and Section 881, of Story's Equity Pleading.

Francis L. Smith for Turnbull & Co.

H. O. Claughton and S. F. Beach for lien creditors.

This was a suit brought by Turnbull & Co. for a decree for the sale of the Mount Vernon Cotton Factory property, in the city of Alexandria, to satisfy the liens upon said property. The property was sold, and the price obtained was altogether inadequate to satisfy the various liens upon it. The contest was mainly between the lienors as to the priority of their respective liens, but there were other questions upon which these rights depended.

The first lien on the property was a deed of trust from Thomas and wife to secure several notes for the deferred payments of the purchase-money. The second, a deed of trust of the same date as the first, but conceded to be subordinate to it, from Thomas to E. F. Witmer, to secure notes amounting to five thousand dollars, payable to the order of G. K. Witmer. The third lien which it is necessary to notice was a deed of trust to secure Turnbull & Co. for advances to the extent of thirty thousand dollars, and the fourth, various judgments of creditors which were docketed in Alexandria County, subsequent to the date of the deed of trust to secure Turnbull & Co. There were five notes secured by the first deed of trust held by Turnbull & Co., which had been paid to the holders at maturity by money borrowed from Turnbull & Co., and the notes after payment were assigned to Turnbull & Co. Four of the notes secured by the first deed of trust were held by W. D. Corse, to whom they were indorsed by George K. Witmer, the agent and attorney of Thomas, on the first or second day of grace of said notes, in payment of claims which Witmer owed individually to Corse, fully secured on real estate of Witmer, and which security

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had been released by Corse at the time of the transfer of said notes and in consideration of the same. Others of these notes were held by the First National Bank of Alexandria. These notes were all printed, with coupons attached, and made negotiable and payable at the First National Bank of Alexandria, Va., but the name of the maker was written above the printed line expressing the place of payment, and of course above the coupons. The following is a sample of the notes :

This note is secured by deed of trust to ———, dated ———, 186—, the stamp on which has been paid.

[65 cent Revenue Stamp.]

ALEXANDRIA, VA.,
January 22d, 1866.

Two years after date I promise to pay to the order of James Green, value received, twelve hundred and twenty-two $\frac{2}{100}$ dollars, with interest from date, payable half-yearly, as per coupons attached hereto, signed by me.

A. THOMAS.

Payable at the First National Bank of Alexandria, Va.

(Coupon.)

July 22d, 1867.

Due James Green thirty-six $\frac{6}{100}$ dollars for half-year's interest on note No. 8, dated January 22d, 1866.

\$36.67.

A. THOMAS.

(Coupon.)

January 22d, 1868.

Due James Green thirty-six $\frac{6}{100}$ dollars for half-year's interest on note No. 8, dated January 22d, 1866.

\$36.67.

A. THOMAS.

Indorsed,

"JAMES GREEN."

There was a written agreement between Turnbull & Co. and Thomas, which was never executed, that Turnbull & Co. should have a lien for advances to the extent of sixty thousand dollars, but the deed carrying out that agreement specified only thirty thousand dollars. It was claimed that the first mortgage notes held by Turnbull & Co. were a lien upon the property, that they were entitled to a lien under the agreement to the extent of sixty thousand dollars, and that the notes held by Corse and the First

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National Bank were not negotiable; moreover, that the notes held by Corse were liable to any equities between Thomas and his agent, G. K. Witmer, and that there was an equity in favor of Thomas, in that Witmer had no right to use the notes of Thomas belonging to Thomas in payment of his own debt due to Corse, principally upon the ground that Thomas was not indebted to Witmer at the time of the transfer of the notes to Corse. Witmer's deposition was to the effect that Thomas was largely indebted to him (and the contract was a part of this case) at the time the notes matured, that he was obliged to have money on account, and that Thomas could not pay him and pay the notes too, so that he charged himself with the amount of the notes, took them up before maturity, and transferred them to Corse as above stated.

Corse maintained that the notes were negotiable, that he took them *bona fide* for a valuable consideration before maturity, and that he took them free from any equity between the maker and his attorney, Witmer; and besides, that Thomas's indebtedness to Witmer at the time of the transfer to Corse was established, and therefore there was no equity in favor of Thomas.

As against the claim of Turnbull & Co., it was maintained that the first mortgage notes held by them had been paid by Thomas at maturity, and ceased to be a lien from that time, and that the transfer of them to Turnbull & Co. did not revive the lien, that they were secured only to the extent of thirty thousand dollars as provided for in the deed.

And the judgment creditors whose judgments had been docketed in Alexandria claimed that as against their judgments Turnbull & Co. had no lien at all, because Turnbull & Co's account against Thomas showed that the balance due them was exclusively for advances made subsequent to the docketing of the judgments, and as Turnbull & Co. were not bound by covenant to make the advances, and had constructive notice of the judgments, the advances were not secured, although there was a balance due at the time the judgments were docketed in excess of the thirty thousand dollars.

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The court, HUGHES, J., *held* :

1st. That Turnbull & Co. were not entitled to claim the amount of the first mortgage notes held by them, because said notes were paid at maturity by the maker.

2d. That their deed of trust was security to the amount of thirty thousand dollars.

3d. That such security availed them to that extent for advances made after the judgments were docketed.

4th. That the notes secured by the first deed of trust were negotiable, and that Corse was a *bona fide* purchaser for valuable consideration without notice.

Authorities as to the negotiability of the notes: The notes being printed, another signature above the printed line expresses the place of payment.

English authorities : *Sproule v. Legge*, 2 D. & R., 15; 1 B. & C., 16; 3 Starkie, 156; *Hardy v. Woodroff*, 2 Star., 319; 1 Starkie, 468.

American authorities : *Tuckerman v. Hartwell*, 3 Greenleaf, 147.

As to who is a *bona fide* holder of negotiable paper : 1 Peters, 31; 8 Conn., 505; 34 New York, 247; 2 Wall., 110; 35 N. Y., 65; 16 Peters, 1.

Authorities as to Turnbull & Co.'s lien as against the judgments docketed in Alexandria County : *Sherras v. Cary*, 7 Cranch, 34; *The United States v. Hore*, 3 Cranch, 73.

Against it: 2 Barr, 96; 13 Mich., 38; 3 Grant, 300; 17 Ohio, 371; 5 Johns., 326; 6 N. Y., 147.

NOTE.—After the filing of the answer, and entering of a general replication thereto at a former term, the cause was at issue. Both parties so treated it, by taking depositions, and contesting the matters at issue before the commissioner. The result of proceedings before the commissioner was to show the defendant that an amended answer was necessary to enable him to make his defence. Leave to file such an answer was obtained from the court at the next regular term, without the defendant having been required to comply with the provisions of Rule 60, making a notice to the complainant necessary. The cause was then, after more than a year's delay, subsequent to filing the amended answer, set for hearing, and at the hearing the complainant was allowed to file a general replication to the amended answer, *nunc pro tunc*, as a matter of form, and then the hearing was proceeded with. See Story's Pleading, Sec. 881.

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*United States Circuit Court, Western District of North Carolina,
at Greensboro', December, 1874.*

WILLIAM P. LITTLE, ASSIGNEE, v. T. L. ALEXANDER.

Where doubt arises whether a transaction is *bona fide* or not under Sections 5128 and 5129 of the Revised Statutes of the United States (Section 35 of the Bankruptcy Act), a United States circuit court in which a bill is filed to set aside such a transaction may, in its discretion, refer the question of *bona fides* to a jury in a case where an involuntary petition in bankruptcy has been filed, and the bankrupt has not had the privilege of a jury.

For the Circuit Court as a court of equity has full jurisdiction over a bill brought to set aside a transaction impeached as fraudulent under the 35th section, to declare the same void, and to enjoin the parties from taking or pursuing proceedings in other courts, touching the same transaction, as well perpetually as temporarily.

On the 1st day of January, 1869, John R. Alexander was largely indebted to various creditors, and had not property sufficient to pay his debts, and these facts were known to himself and the defendant, T. L. Alexander.

John R. Alexander was justly indebted to the defendant, and gave his promissory note, executed on the 1st of January, 1869, in renewal of former *bona fide* notes which evidenced such indebtedness.

An action at law was commenced on the renewed note on the 16th day of March, 1869, in the Superior Court for Mecklenburg County; "judgment for the want of an answer" was entered at Spring term, 1869, of said court; this judgment was duly docketed on the 19th day of May, 1869; an execution on the same was issued on the 17th of June, and was levied on the lands of John R. Alexander on the 14th day of August, 1869; and this defendant was about to enforce a sale of said land when a writ of injunction in this cause was granted.

Some of the other creditors of John R. Alexander had commenced actions upon their debts and failed to obtain judgment at said Spring term, because a defence was put in by Alexander,

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which, according to the course and practice of the court, delayed a trial of such causes.

John R. Alexander was duly adjudged a bankrupt in the District Court of Cape Fear, upon a petition filed by creditors on the 1st of September, 1869, within a period of four months after the judgment of T. L. Alexander was obtained and docketed.

DICK, J.—The renewal of the note on the 1st of January, 1869, was a *bona fide* transaction, and in no way gave a preference to T. L. Alexander over other creditors, which can be regarded as fraudulent at common law, by the laws of this State, or under the Bankrupt Act.

The statute of this State (usually called the Stay Law) in relation to debts contracted previous to the 1st day of May, 1865, was unconstitutional, and was so declared by the Supreme Court of this State at January term, 1869, in the case of *Jacobs v. Smallwood*, 63 N. C., 112. All creditors of J. R. Alexander, whether they hold old or new notes, had like remedies in law, and were entitled to stand upon equal footing in the court at Spring term, 1869; and if any legal rights were denied a creditor by the ruling of a judge, he has no just cause to complain of another creditor who obtained an honest advantage by pursuing the lawful course and practice of the court.

An insolvent person merely allowing a judgment to be taken for the want of an answer, by which one creditor obtained a preference over other creditors, is not an act of bankruptcy under the statute, and the judgment is not *per se* fraudulent and void. The omission to plead must be voluntary and with intent to defraud the general creditors, by giving a preference to a particular creditor, and these facts are to be proved by direct testimony, or they may be inferred from the circumstances attending the transaction. If the circumstances under which the judgment by default was allowed by the debtor were sufficient to constitute an act of bankruptcy, then the creditor who received such judgment or was benefited thereby, within a period of four months before proceedings in bankruptcy were filed, knew, or had reasonable cause to believe, that the debtor subsequently declared a bankrupt was insolvent, and that such judgment was allowed by the debtor in

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fraud of the Bankrupt Act, then such judgment in contemplation of a court of bankruptcy is void, and the assignee is entitled to such relief in the circuit or district courts of the United States against the judgment as will enable him properly to administer the assets of the bankrupt.

In the case before us the intent of preference and all collusion is positively denied in the answer and depositions by both parties to the judgment, and there is no direct evidence sustaining contrary averments, and both of said parties are proved to be men of good credit and character.

The facts that the relation of father and son existed between said parties, that the son obtained judgment by default when other creditors of the father were prevented at the same term of the court from obtaining judgment because pleadings for that purpose were entered, and other incidental circumstances mentioned in the evidence filed in the cause, have a strong tendency to show that the allegations of fraud and collusion made by the plaintiff are well founded.

It is, however, insisted by defendant that the judgment was obtained according to the course and practice of the court; that it is not fraudulent at common law, or under any of the laws of this State, and such transaction is not essentially immoral or dishonest; that the Bankrupt Law, in refusing to allow a person declared to be a preferred creditor any portion of the assets of the bankrupt, is highly penal and ought to be strictly construed, and in a case like the one before us there should be no intendments but those which are fully sustained by the evidence, or which arise from strong legal inference.

This conflict of inferences arising out of the evidence, renders it proper that the controverted questions of fact should be determined by a jury. It is therefore ordered that proper issues should be prepared by the counsel of the plaintiff presenting the questions of fact as above indicated and be submitted to a jury at the next term of this court, to be heard and determined upon the pleadings and proofs filed in this cause.

Various questions of law were presented in the argument which can now be determined, so that the case may be placed in

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a condition to be finally disposed of at the next term when the verdict of the jury is rendered on the issues submitted.

The counsel of the defendant insists, "That the court being restrained by the Process Act of 1793, cannot grant the relief to stay proceedings in the State court."

To determine this question we must briefly consider the nature and extent of the equitable jurisdiction of this court. The circuit courts of the United States are created and invested with jurisdiction by acts of Congress, and in all cases to which the judicial power of the United States may extend that jurisdiction both in law and equity may be made superior and exclusive. In a certain class of cases the jurisdiction of these courts is made concurrent with the jurisdiction of the State courts.

The Federal and State courts are separate and independent tribunals, and in all cases where they may exercise concurrent jurisdiction they carefully avoid a conflict by uniformly observing the well-settled rule that the court that first takes possession of the controversy, or the property in dispute, must be allowed to dispose of it finally without interference or interruption from the co-ordinate court. In all cases where the jurisdiction of the Federal courts is made original and exclusive, it is also necessarily superior, and all actions of State courts upon such questions are regarded as nullities by the Federal courts.

How far this judicial power of the United States may be extended under the Constitution is always a question for the legislative wisdom and discretion of Congress, in enacting a statute on the subject, and the constitutionality of such statute, when questioned, can only be determined by the judicial department of the general government.

The United States circuit courts within the limits of their authority as prescribed by statute, are invested with such equitable jurisdiction as is usually exercised by a court of chancery; and in all cases coming within their cognizance, where equitable elements are involved, may restrain persons within their jurisdiction from proceeding in any of the courts of law of the United States, or in any foreign court; so that they may adjust and determine all equities between the litigant parties.

This injunctive relief against proceedings in another court is

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not effected by any prohibition directed to such court, but by process restraining the plaintiff personally from taking further steps. The writ of injunction in no way affects or interferes with the action of the court in which the proceedings are pending; it assumes no superiority over such court, or denies its jurisdiction. Story Eq., sec. 875; Adams Eq., 195.

If the act of March 2d, 1793, had never been passed, a circuit court of the United States, in exercising its equitable jurisdiction as other courts of chancery, would hardly have issued a writ of injunction directed to a State court. It may be, that said act was intended to prevent a writ of injunction from being issued to a party to prohibit him from carrying on proceedings in a State court; but certainly such statutory restraint can only apply where the State court has full and concurrent jurisdiction with the Federal court of the parties and subject-matter in dispute. The original and exclusive jurisdiction of the United States courts would amount to but little, if they had no power to maintain, secure, and enforce it by proper process against persons who seek to evade, or who openly disregard and defy their authority.

The Constitution invests Congress with the authority to establish uniform bankrupt laws; and where that authority is exercised, the act of Congress supersedes all State legislation on the subject, and all rights and liabilities subsequently arising under such Bankrupt Act can only be heard, adjusted, and determined in the courts of the United States, unless otherwise provided in such act. A national bankrupt law is a supreme law of the land, and the courts of this State are as much bound to observe its provisions as if it had been enacted by our State legislature.

Under the Bankrupt Act, proceedings in bankruptcy must be commenced in the United States district courts, and such courts have full and complete jurisdiction, both in law and in equity, over all matters relating to the settlements of the estates of bankrupts, and for such purposes do not need the active assistance of any other court.

Congress, however, in its wisdom has seen proper to confer upon circuit courts, concurrent jurisdiction with the district courts of the same district in certain cases where the title of

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property of the bankrupt is in dispute, or the claim of the assignee to the assets is denied, embarrassed, or resisted; and where liens and priorities are to be ascertained, adjusted, and enforced, by the methods usually resorted to by courts of chancery.

After consulting many of the adjudged cases referred to by counsel, making a fair and reasonable construction of the statute, and keeping in view the purposes for which the bankrupt system was established, we are well satisfied that this court, in the exercise of its equitable jurisdiction, can declare void any transfer of the property of a bankrupt which is fraudulent under the Bankrupt Act, and may, by writ of injunction, restrain any party to such fraud from attempting in any manner to carry out the fraudulent transaction.

The subject of controversy in this case comes fully within the jurisdiction of this court. A docketed judgment under the laws of this State is a security for money, and has the force and effect upon the land of the judgment debtor of a mortgage after the time of redemption has passed (*Perry v. Morris*, 65 N. C., 221), and comes within the meaning of the 35th section of the Bankrupt Act.

If the jury at the next term, in passing upon the issues directed to be submitted, shall find such a state of facts as will authorize us to pronounce the judgment in question in this case fraudulent and void, we shall not hesitate to issue a writ of injunction to protect the rights of *bona fide* creditors, and prevent guilty parties from deriving any benefit from a fraudulent transaction.

The objection to the plaintiff's bill for the want of proper parties cannot be sustained. It appears that the plaintiff, as assignee, offered the land in question for sale, and after consultation with the creditors of the bankrupt, and for the purpose of securing a fair price for said land, requested Robert D. Whitley to bid at the sale for the benefit of the creditors. At the sale the said Whitley was declared to be the last and highest bidder, but no conveyance has been made to him. He was merely an agent, and has no personal interest in the matter. The general rule in a court of equity upon this question is, persons must be made parties to a suit, who are interested in the subject-matter in dispute, whose rights may be affected by the proposed decree, or

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whose concurrence is necessary to a complete arrangement. Adams Eq., 3, 12. A person who merely acts as the agent of another in purchasing at a sale the property in dispute, has no interest in the subject, and is not a necessary party. In such a case all difficulty may be avoided by the agent filing a written renunciation of all interest in the suit before a final decree is made. Dan'l Ch. Pr., 191; *Ayers v. Wright*, 8 Iredell's Eq., 229.

The injunction in this case is continued until the case is heard upon the verdict of the jury on the issues directed to be submitted.

In the District Court of the United States for the Eastern District of Virginia, at Richmond, April, 1877.

CRUMP, ASSIGNEE, v. ALEXANDER CHAPMAN.*

A bill in equity brought to set aside a sale as fraudulent, under Sections 5128 and 5129 of Revised Statutes of the United States, as amended June 22d, 1874, must charge that the defendant *knew* that the sale was in fraud of the provisions of the Bankruptcy Act, and this *knowledge* must be proved in evidence.

Where such an averment and such proof are wanting, the bill will be dismissed.

IN equity.

J. M. Gregory and John S. Wise for complainant.

John Lyon for defendant.

HUGHES, J.—The firm of Hutcheon Brothers were engaged in business in two adjoining tenements on Seventeenth Street, Richmond, Va. In one of them they were conducting a bar-room; in the other a family grocery store. The firm consisted of two brothers, Archibald and George Hutcheon. They lived in the upper rooms of the premises, and were unmarried; a maiden sister, until within a short time of the transactions con-

* This report is taken from the Virginia Law Journal, vol. i, p. 304, May number, 1877.

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nected with the bankruptcy proceedings in the case of Hutcheon Brothers, keeping house for them.

In November, 1876, George Hutcheon suddenly disappeared, having on his person between three and four hundred dollars of the money of the firm; taking no baggage, and making no previous preparation or announcement of his purpose. He has never since been heard of. The probability is that he was waylaid and foully dealt with in this city, as no clue has ever been found to give the least indication of his fate.

The surviving brother, Archibald, was naturally much disconcerted in his business and disturbed in mind by the occurrence.

Whether from this cause alone, or this and others combined, this brother and the firm became insolvent.

On or about the 23d of December, 1876, Archibald Hutcheon sold the stock in trade, lease, and good-will of the barroom to one James C. Shadbolt. On the 23d of December, 1876, he contracted with Alexander Chapman, the defendant in this cause, to sell him the stock in trade, accounts, lease, and good-will of the grocery store; and on the 25th of December he delivered to Chapman the store and contents.

It was agreed between A. Hutcheon and Chapman that Hutcheon should remain as employé in the store on agreed wages for a month or more.

There is no doubt that Hutcheon Bros. were insolvent at the time of this sale, and that Archibald Hutcheon had reason to believe that he and his firm were then insolvent, and that the assignments he made on that day were acts of bankruptcy.

There is doubt from the evidence whether he made the sale with any design to defraud the bulk of his creditors of their right to equal distribution under the Bankruptcy Act.

On the 25th and 26th days of December, 1876, attachments were sued out of a State court, of Richmond, against the firm as absconding debtors, though Archibald Hutcheon was in the city, at his usual place of business. These were levied, on the 25th of December, upon the contents of the barroom, then in the possession of Shadbolt; and they were levied, on the 26th of December, on the contents of the grocery store. The property seized being perishable, the State court ordered its sale before the trial

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of the attachment suits; and the proceeds to be deposited in bank to the credit of the State court, which was done.

At the trial of the attachment suits the plaintiffs were cast; but great damage had been done to Shadbolt and to Chapman by the seizure of the property which had been sold them by A. Hutcheon, and by its hurried sale by the sheriff.

On the 25th of January, 1877, a petition was filed in this court by certain creditors of Hutcheon Bros., charging the sales which have been mentioned to have been acts of bankruptcy, and praying that the firm and each member of it might be declared bankrupts.

Archibald Hutcheon answered the petition, denying with much feeling all intention of fraud.

On the 20th of February, 1877, the firm were adjudicated as bankrupts, on technical grounds; the order of adjudication embodying a clause relieving the firm from the imputation of actual fraud.

The assignee in bankruptcy of Hutcheon Bros. now brings this suit on the equity side of this court, charging that the sale to Chapman was made by an insolvent firm, under circumstances, *as to* Chapman, which constituted reasonable cause for his believing that they were insolvent, charging, therefore, that the sale or assignment was void, and praying the court for a decree declaring it null and void, and for the usual relief granted in such cases.

The evidence which has been taken in this case is quite voluminous, but I do not think it necessary for me to go into a detailed discussion of it.

Chapman, the purchaser of the grocery business and stock of goods, seems to be quite a young man, without experience in that kind of business.

He denies with emphasis in his answer and in his depositions having had any knowledge of the insolvency of the firm of Hutcheon Bros. at the time of his purchase of the business, or any knowledge of any intention on the part of Archibald Hutcheon, in making the sale of the grocery business to him, to commit a fraud under the provisions of the law of bankruptcy.

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All his statements on these heads are consistent, positive, and very earnest.

Most of the evidence which has been taken by the complainant goes to the point of proving the insolvency of Hutcheon Bros. I think that the evidence of that fact, which has been taken, is admissible against Chapman.

But, of the evidence which was taken tending to prove that Chapman had reasonable cause to believe the insolvency, only such is admissible against him as is brought home to his personal knowledge before and at the time of his purchase, and as consists with the rules of evidence which are usually enforced in courts of justice.

The evidence of this sort taken in this cause really admissible against Chapman is exceedingly meagre.

This is a suit in equity in which the plaintiff has put the defendant upon his answer under oath, and in which the averments of that answer, which are responsive to the charges in the bill, must stand as true, until overcome by the testimony of either two credible witnesses or one credible witness and strong corroborating circumstances.

Now I do not think the evidence taken for the plaintiff in this cause tending to prove that Chapman had reasonable cause, on the 23d of December, 1876, to believe that the firm of Hutcheon Bros. was insolvent, and that Archibald Hutcheon made the sale to give him a preference and to evade the provisions of the Bankruptcy Law, is so strong and conclusive as to outweigh the positive, earnest, emphatic, reiterated, sworn denial of the charge, made by Chapman in his answer.

This holding of mine, however, does not touch the real point on which the case turns, and it is unnecessary for me to dwell upon this part of the case.

It is not worth while to examine critically the evidence on this point, or to weigh it in comparison with the averments and denials of the answer.

The case really turns upon another and quite different question.

Nor is this bill to be treated as one brought under the first section of chapter 114 of the Code of Virginia, to set aside a sale

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as fraudulent in fact, or as a sale to be considered *prima facie* fraudulent from the fact that the vendor remained in custody of the goods sold. There is nothing in the frame or allegations of the bill to give it such a character.

It is, therefore, not competent for me to consider the authorities cited by counsel for the plaintiff, ranging from *Twyne's* case in Coke's Reports down to the *Davis* and *Turner* case in 4th Grattan, cases in which the effect of the vendor's retaining possession of the goods, after sale, upon the validity of the sale, is treated.

The bill in this case is founded purely and simply upon Sections 5128 and 5129 of the Revised Statutes of the United States, as amended by Section 11 of the act of June 22d, 1874.

Those sections, as amended, require that the person receiving the benefit of an assignment from an insolvent must not only have reasonable cause to believe the vendor to be insolvent, but must "*know*" that such assignment is made in fraud of the provisions of the Bankruptcy Law. Under the amendment of June, 1874, a sale which is an act of bankruptcy on the part of the insolvent is not void as to the vendee, unless the vendee "*knows*" that it is made in fraud of the provisions of the Bankruptcy Act. *Singer v. Sloan*, 12 B. R. R., 208, and 11 B. R. R., 441; *Tinker v. Van Dyke*, B. R. R., 112, and in 11 B. R. R., 308; and *Barnevell v. Jones*, 14 B. R. R., 278.

Certainly, therefore, since that amendment has been made a part of the law of bankruptcy, has it become necessary in bills of this sort to charge that the person receiving the benefit of a preference or assignment *knew* that it was made in fraud of the provisions of the Bankruptcy Acts.

Certainly it is necessary for the plaintiff, in his evidence taken in support of such a bill as this, to prove that the defendant *knew* that the assignment to him was made in fraud of the provisions of the Bankruptcy Act.

Both of these prime essentials are wanting in this cause. The bill does not contain the material averment and charge required by the amending act of June, 1874. Though no advantage of this omission was taken in time by demurrer, no evidence has been brought to prove that this knowledge existed on the part

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of the defendant, no direct evidence at all, and no circumstantial evidence sufficient to establish the fact.

Hutcheon and Chapman being both foreigners, knowing little of our law, it is not probable that either the one or the other of them had any knowledge of the Bankruptcy Act, or suspicion that their transaction was in fraud of its provisions.

It is true that ignorance of the law excuses no one, but yet when a law in express terms makes it necessary that a citizen, in being passive party to an act, shall know that a law is violated in order that the act shall be declared void, the burden of proof is thrown upon the party complainant in a suit brought to set aside such an act to establish the fact of knowledge of the violation.

I will sign an order dismissing this bill.

*United States District Court, Eastern District of Virginia, at
Norfolk, January, 1877.*

HARMANSON, ASSIGNEE, v. BAIN & BRO.*

1. Equity has jurisdiction of a bill charging fraud, which, except in form and as to the forum is nothing more than an action of *indebitatus assumpsit*, even though the fraud charged is only the *constructive fraud* contemplated by Section 5128 of the Revised Statutes of the United States. (Section 35, Bankruptcy Act.)
2. If, however, the allegations of such a bill be disproved, and the real *gravamen* be found from the evidence to have been transfers of property, charged to have been made in violation of Section 5128 in favor of several persons not parties to the bill, in independent transactions—
Held, that the bill described in 1, cannot be treated as brought to set aside the said transfers, *first*, because it does not pray for such a thing in terms; *second*, because it has not made all the persons connected with them parties defendant; and *third*, because even if it had made them all parties, it would have been multifarious: *Held*, therefore, that the bill must be dismissed.

* This case is also reported in 15 N. B. R. R., 178.

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3. Where an incorporated society which had been a bank of discount, deposit, and circulation in Virginia, ceased its business in 1862 in consequence of public invasion, and in 1865, after publishing that it would make settlements as far as practicable by set-off, undertook no other business than the liquidation of its affairs, in which it was much hindered by stay laws in force until 1869, and where before completing its settlements, it was thrown into bankruptcy in June, 1872,

Held, that the question of its insolvency as against persons with whom it effected settlements within four months before the bankruptcy, should not be considered as if the society was a trader, merchant, or bank, but with reference simply to whether its liabilities could meet its assets, that being the basis on which all had dealt with it for seven years.

4. Transfers of property are not void under Section 5128, where it is proved affirmatively that the persons who effected them with the debtor had no intention of obtaining a preference, or the debtor of giving it.
5. Where the deposits due from a society which for ten years had ceased business as a bank and ceased to receive deposits, and which for seven years had been in liquidation, have ceased to be deposits of money, and become mere debts, and a commodity bought and sold in the market like public stocks, and are not paid or payable in money and are only available by way of set-off in favor of debtors to the society,

Held, that papers in the form of checks on these deposits are not checks, because not representing money, not payable at sight, and too much limited in negotiability as to the persons having use for them, but are mere evidences of the assignment of choses in action in the form of deposits.

Held, also, that persons who sell such papers in the form of checks are not responsible to the assignee in bankruptcy of the society owing the deposits, for the amounts stated in dollars on the face of the papers called checks.

6. Upon a bill in the District Court to impeach a transaction charged to be void under Section 5128, that court, sitting in equity, is not concluded by an order of adjudication, which it has made in involuntary bankruptcy, declaring the said transaction to have been an act of bankruptcy; for the reason, that the character of the court, the evidence, the parties to the proceeding, and the technical quality of the act itself, are different in the two proceedings.

In equity.

This case was heard at Norfolk, on the 30th of December, 1876.

Scarburgh & Duffield and James E. Heath, of Norfolk, for the complainants.

W. W. Crump, of Richmond, and W. W. Old, of Norfolk, for the defendants.

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The case was decided on the 3d of January, 1877, and an order made dismissing the bill on the 20th of January.

The Portsmouth Saving Fund Society of Portsmouth, Virginia, was a bank of discount, deposit, and circulation, on a capital of \$32,000, for a period of some twenty years anterior to 1862. It was compelled to close its doors in that year by the troubles of the country. Its cashier, George M. Bain, Sr., now dead; preserved its assets as best he could, with care and fidelity, during the period and until the close of the civil war. The first meeting of the directors of the society after that event was held on the 11th of August, 1865; but there does not seem to have been any definite official ascertainment of the condition of the society until July 3d, 1866, when a committee, which had been appointed for the purpose, reported its assets to be at par valuation, less an item of profit and loss, \$226,700; and its liabilities, less its capital stock, including all notes of circulation outstanding, \$220,532.

At the resumption of its business in August, 1865, the assets of the society consisted chiefly of notes which had been discounted before 1862, and which had been lying overdue since that period. Its liabilities consisted chiefly of amounts due to depositors and to the holders of the notes of circulation; the amount of the former being \$183,210.40, and the amount of the latter (if none of the notes were lost) being about \$36,726.21. A stay law was in force in Virginia, which remained until January, 1869. The statutes of limitation were also in suspension, and there was no chance of making collections by suit.

In this condition of things the society did not venture upon a resumption of its regular business; and its directors resolved to open the doors of the bank merely for the liquidation of its affairs. At their first meeting, held August 11th, 1865, they "ordered that the cashier receive the notes of the institution and checks for deposits in payment of any debts due to the institution, and that the cashier give notice that the persons indebted to the institution can pay or renew their notes as formerly."

Thus resuming operations only for the purpose of liquidation, the business proceeded on that basis for about seven years, until the 12th of June, 1872. It had but one officer, George M.

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Bain, Sr., in its place of business, and part of his time was given to other affairs. Its directory met but very seldom after long intervals. No banking business was done. No business but that of liquidation went on during this period of seven years. Except from sales of real estate no cash seems to have been received by the society during this period of liquidation. Except possibly as to cash received from sales of real estate, no notes seem to have been discounted otherwise than in renewal or settlement of old notes representing debts which originated before 1862. No cash was paid to depositors or to holders of notes of circulation. Nor did these two classes of creditors expect payment in cash or demand it at the counter from the cashier of the society. When notes of circulation were presented to the society, I infer that they were credited as deposits. Interest was credited to the depositors regularly each six months during the period of liquidation.

By June 12th, 1872, notwithstanding the hindrances of the stay law, the affairs of the society had been liquidated to the extent of about \$200,000. There was still due to the depositors at that date \$84,840, and there had been paid and credited of interest to the depositors \$77,476 since 1865.

This large liquidation had been effected almost exclusively by the process of set-off. Persons indebted on notes to the society would purchase from depositors assignments of deposits in the amounts wanted by them. These assignments were made in the form of checks, and were called or miscalled *checks*.

The society being in liquidation and its deposits and notes having become choses in action, and commodities bought and sold in market like public stock, Bain & Bro., bankers and brokers of Portsmouth, as well as others, from time to time, bought largely of the deposits, making their heaviest purchases at par prices, and smaller ones at prices ranging from one hundred cents down to eighty and sixty cents. A few small deposits seem to have been bought by them and others at thirty cents. The holders of the large deposits seem to have had more or less confidence in the solvency of the society, and held their claims at par. The holders of smaller deposits seem to have sold at prices less than par as their needs or convenience induced. These

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assignments of the deposits in the form of checks were never treated as negotiable paper by being presented to the society for payment, and protested for non-payment. In fact they could only be used by debtors to the society in setting off their debts.

Among the deposits bought by Bain & Bro. were those of John Nash, amounting to \$11,517; of the Old Dominion Lodge, amounting to \$9000; of W. D. Whidbee, amounting to \$1143; and of Nathaniel Owens, amounting to \$2125; these particular deposits making a total of \$23,785. They were purchased in the early part of 1870. The alleged object of Bain & Bro. in purchasing them was to settle with them by set-off certain notes due to the society, to wit: a note of Bain & Co., a mercantile firm, for \$5000; a note of George M. Bain, Jr., for \$4300; and two notes of R. T. K. Bain for \$1461 and \$1466 respectively. The makers of these notes, with one exception, were members of the banking house of Bain & Bro. The notes, for the settlement of which these deposits were purchased, fell due in August and September following the purchases, and were never renewed. The directors of the society after that time ordered suit on all notes not renewed; but those of the Bains were not sued upon. According to the testimony of two of the firm they were not sued upon because they were considered by the society and their firm as having been settled by the deposits purchased for the purpose. But no actual entries were made taking the subjects of this set-off off the books of the society until June 4th, 1872.

At a meeting of the directors, held on the 4th of June, 1872, the cashier informed them of a suit pending against it on which judgment might be expected, in July proximo. This statement brought the directors face to face with the question whether or not an assignment should be made for the protection of creditors other than the one who was suing for judgment; and a committee was appointed to examine into the affairs of the society, with instructions to report before the 12th instant, to which day the directors adjourned. The alleged object of the committee was to ascertain whether or not the society was solvent.

At a meeting of the 12th of June, the majority of this committee reported the condition of the society (estimating each asset and liability at its supposed value or amount) to be as fol-

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lows: assets, \$72,679; liabilities, \$105,502. The liabilities included old notes of circulation outstanding to the amount of \$20,080, none of which (except for \$27.50) have been proved in bankruptcy, and all of which have probably been lost. The committee estimated that not more than \$5000 of these notes would ever come in; and therefore computed the actual value of the assets of the society at \$72,679, and the amount of liabilities at \$90,500. The result disclosed by their report was that the society was insolvent.

Before this report was made, that is to say, at times between the 12th of April and the 12th of June, 1872, Bain & Bro. had assigned deposits held by them in the society to the amount of \$15,307, executing their assignments in the form of the "checks" which have already been referred to. Most of these were made to persons who purchased them with a view of making settlements with the society, of debts due on notes; and the principal one of them, for the amount of \$14,449, dated on the 4th of June, 1872, was drawn for the purpose, as they allege, of clearing off from the books of the society, first the several notes due by persons of their name which have been mentioned, and also balances due on three notes of one Bilisoly for about \$750, and a note of one Campbell for \$240; these latter being due from persons wholly irresponsible, and voluntarily paid by Bain & Bro.

The particular assignments by Bain & Bro. of their deposits in the society to the amount of \$15,307 to different persons, settled the following matters, which, as will be seen if computed, make up the aggregate of \$15,307. This amount of money is the subject of the suit which is now before the court for decision.

A curtail and discount for H. Wilson, ...	\$18 94
A note of one Westwood, ...	29 27
A curtail and discount for some one not remembered, ...	32 03
A note of one Brownley, ...	10 26
A curtail and discount for H. Wilson, ...	18 79
A note of Bain & Bro. lying over since 1870, principal and interest, ...	5518 33
A note of George M. Bain, Jr., lying over since 1870, principal and interest, ...	4562 30

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A note of R. T. K. Bain lying over since 1870, principal and interest, ...	\$1615 87
A note of R. T. K. Bain, lying over since 1870, principal and interest, ...	1621 44
A balance due on notes of J. A. Bilisoly, indorsed by J. A. Benson, lying over since 1870, principal and interest, ...	792 90
A note of J. B. Campbell, principal, protest, and interest, lying over since 1870, ...	388 41
A check given to take up sundry cash anterior memoranda held against Bain & Bro. by the cashier of said society, ...	404 51
A check in favor of G. M. Bain, Jr., ...	5 52
A note of T. M. Grant, ...	196 94
A deposit placed to the credit of Mary J. McRae, which is still there, ...	50 00
A check in favor of one Brownley, ...	20 00
A check in favor of George L. Neville, ...	20 89

The four larger of the notes just mentioned were the same which were referred to in a previous part of this statement, and amounted, principal and interest, to \$13,317.94.

On the same 4th of June the directors authorized a note of J. G. Holladay, for the sum of \$3000, to be credited by a check which Mr. Holladay presented for like amount drawn by George L. Neville, one of the depositors of the society. They also authorized one or two smaller transactions with other persons, of a similar character, on the same day.

Similar transactions are shown by the books of account to have been had by the society within four months before the bankruptcy, on which no suits have been brought, to the amount of \$8207.59.

At their meeting on the 12th of June the directors resolved that a deed of assignment should be made, and ordered that one should be executed. At the next, or a subsequent day, a deed had been prepared and executed by the president, but it was never expressly ratified by any order of the directors, or sealed with the seal of the society, the use of this latter for that purpose being refused by the cashier, George M. Bain, Sr., now deceased.

On the 17th of June, 1872, James G. Bain, a creditor of the society, filed a petition in this court against it in involuntary bankruptcy, charging as an act of bankruptcy the transaction of

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the directors with J. G. Holladay, which has been mentioned. On the 25th of September, 1872, this creditor filed an amended petition, charging that the execution of the deed of assignment of the 12th of June was an act of bankruptcy. On the 8th day of November, 1872, after a hearing of the petition and amended petition, the then judge of this court made an order in the usual terms of form 58, 9th edition Bump, page 937, adjudicating the society a bankrupt. From this order there was an appeal to the supervisory jurisdiction of the Circuit Court. On the 11th of October, 1873, the Circuit Court affirmed the order of the District Court in an order reciting the transaction with J. G. Holladay as an act of bankruptcy. This order was suspended afterwards by that court on a petition for review, and a rehearing granted. But on the 9th of April, 1874, after the rehearing, that court made an order renewing its order of October, 1873. The usual proceedings in bankruptcy were accordingly afterwards had in this court, and L. Harmanson became assignee of the assets of this bankrupt.

On the 26th July, 1875, the assignee filed his bill in this court against Bain & Bro., as a firm, for the recovery of \$15,307, charged to have been paid to them by the society on their checks drawn within four months before the 17th June, 1872. The bill makes the proceedings and papers in bankruptcy part of the record, and, after sundry formal recitals and allegations, charges that the Portsmouth Saving Fund Society being insolvent and in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, with a view to giving preferences to Bain & Bro., who then had a large claim against the society for deposits, made certain payments, aggregating \$15,307, on certain several days, in certain several sums stated, on "*checks*" of the said Bain & Bro., who were the persons receiving the said payments and to be benefited by them, they having reasonable cause to believe the said society to be then insolvent, and knowing and having reasonable cause to believe that the said payments were made in fraud of the provisions of the Bankruptcy Act of the United States; and the bill further charges that the said payments are void, and that the plaintiff is entitled to recover of the said Bain & Bro. the said sum of \$15,307. The bill

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makes no other person defendant than Bain & Bro. It prays that they may be required to pay to the plaintiff the said several sums of money, amounting to \$15,307.

There is no allegation in the bill that the "*checks*" sued upon were paid to Bain & Bro. in anything else than money. There is in the bill no description or mention of or allusion to the property which passed from the society in settlement of the "*checks*" of Bain & Bro.

The answer denies that the society made to the defendant or any of them the payments or any of them in the bill mentioned, and denies that the defendants or any of them received or were benefited by any such alleged payments. It admits that the "*checks*" spoken of were drawn and signed by the defendants, but denies that any payments were made to them on account of the said "*checks*." There was also a demurrer to the bill, the ground of demurrer being that, on the case stated by the bill, the plaintiff had full and complete remedy at law, and a court of chancery had no jurisdiction.

HUGHES, J.—I am to consider this bill, first, as to its technical character and sufficiency, and second, as to the merits of the case presented by it.

1. When the argument was heard on the demurrer, neither the court nor the counsel for either party to the cause knew the facts as they have been disclosed by the evidence since taken. The court was wholly ignorant of those facts.

The case, considered on the demurrer, was that of checks drawn by a depositor on a bank charged to have been at the time insolvent, which checks the bill alleged to have been paid to the drawers of them, and to have been drawn and paid under circumstances of knowledge and collusion, which, by Section 35th (5128) of the Bankruptcy statute, made them void and fraudulent. The bill prayed that the drawers of the checks, Bain & Bro., who were charged to have received the benefit of the preferential payments, might be decreed to repay the money received by them on the checks.

The bill was, except in form, nothing more nor less than an action of *indebitatus assumpsit* for money of the society had and

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received by the defendant, and the only question presented by the demurrer was, whether a bill of the sort would lie, where the only ground on which the equitable jurisdiction could be founded was confessedly the allegation of *constructive fraud* under the 35th section of the Bankruptcy Act, no actual fraud being pretended.

If it had been a case of first impression, I should have unhesitatingly decided in favor of the demurrer, but the authorities were numerous in asserting that constructive fraud was sufficient *per se* to support the equitable jurisdiction, and I felt constrained to overrule the demurrer.

But the evidence taken upon the issues joined in the bill and answer has most surprisingly changed the aspect of the case.

The bill is founded upon papers which it calls checks, and which it treats as representatives of money. But these papers were not checks except in form. A check is a draft for the payment of money drawn against deposits of money on a bank or a banker doing a banking business, payable at the instant of presentation in money, to any bearer, if made payable to bearer, or or to any holder by order, if made payable to order. Its two essential qualities are, being a representative of money, and having mercantile or unlimited negotiability. It would be preposterous to pretend that the checks named in this bill were payable in money, or that there were any deposits of money to meet them. And they were not mercantile paper with unlimited negotiability payable to any holder, because very few could hold them, namely, the few who were debtors to the bank, and in position to avail of them in the way of set-off. Nor were these papers called checks representatives of cash money in any sense. Nor were they drawn against a bank, but only against a corporation, in slow, tedious liquidation, which had ceased to be a bank for ten years. They were but the mere evidences of assignment by their drawers of choses in action in the form of deposits, which deposits were not payable in money.

The better opinion now obtaining is, that even a mercantile check on a vital bank, passes the title to its bearer by assignment, before presentation for payment and at the time of delivery; giving him the right to sue the bank for the money covered by the check from the time of his receiving it, though, in passing

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from hand to hand it might get back, before presentation for payment, to the drawer himself. See *Morse on Banks and Banking*, pages 465 to 474, and the numerous cases there cited. Every check, therefore—every draft that is a check in fact as well as form—may now be considered as an assignment before presentation for payment; of course it is after presentation. Certainly it cannot be contended that a paper which is merely in the form of a check, not mercantile, narrowly limited in negotiability, not drawn on a bank or banker, not payable in money, has any other value than as the evidence of an assignment of a chose in action.

The checks, therefore, so called by this bill, were but assignments. And I do not suppose that it will be pretended that a person who assigns, without guarantee, a chose in action which has become a commodity in the market, like public stocks, or government bonds, at its market value, the public and all parties to it knowing the condition of the commodity, becomes responsible to any one for the face value of the chose in action sold. Yet that is the claim on which this bill is based, made of course when the counsel thought these were mercantile checks for money in fact.

The case, therefore, in the light of the evidence before me, presents an aspect wholly different from that which it presented at the hearing of the demurrer, and which the eminent counsel who drew the bill supposed that it wore.

The Portsmouth Saving Fund Society, which was assumed by the bill to have been a bank of discount and deposit, doing business as such up to the time of the filing of the petition against it in bankruptcy, turns out to have long before suspended its regular business, and to have been doing nothing else than liquidating its old business for seven years before that event, by the process of set-off.

The checks mentioned by the bill as drawn by the defendants, turn out not to have been checks except in form; and to have never been received, held, or presented for payment as bankable, protestable, negotiable paper; but to have been in legal effect, in fact, and in the minds of the receivers of them, the holders of them, and the society against which they were drawn, nothing

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more than evidences of the assignment of claims against the society to those who received them, by those who drew them.

The payments of money charged in the bill to have been made by the society to the defendants on these miscalled "checks," turn out to be wholly imaginary and theoretical; no cash having actually been paid in consequence of them; the so-called checks having been used as mere vouchers to serve as the basis for various entries in the books of the society.

The theory and allegations of the bill have thus been wholly contradicted by the evidence. The *probata* have entirely refuted the *allegata*, and the suit considered as an action against Bain & Bro., for money of the society had and received by them, has failed and must fall. No money was paid by the society on the checks; none was received from the society by the defendants; nothing at all passed from the society to Bain & Bro., in their own right and for their own benefit, as charged by the bill; and, in their own right as a firm, they had no interest in any transaction of the society in and about the checks after they had passed from the defendants. Bain & Bro. simply held choses in action against the bank. For seven years these deposits had been an article of merchandise in Portsmouth. As such they were sold and assigned by Bain & Bro., by the instrumentality of checks, or orders, or bills of sale, as the usage authorized. And Bain & Bro. had the legal right to sell those choses in action in the market for what could be got, without any reference to the bankruptcy of the society whatever, up to and even after the filing of the petition in bankruptcy. The act of Bain & Bro. in selling their claims for the market price, up to the day of the petition, and in evidencing their sales by drawing checks and delivering them to the purchasers, was in itself legal, and could not of itself subject them to any liability for what the purchasers might do in their own subsequent negotiations with the society. Bain & Bro.'s transactions, as assignors of their own right, title, and interest in the deposits, ended with the drawing and delivery of the checks. In their own right they received nothing from the society. And therefore the bill cannot be sustained, assuming that it made no one defendant but the firm of Bain & Bro.

But it so happens that the firm of Bain & Bro. was composed

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of several members, some of whom were identical with some of the men whose notes were taken up by them. George M. Bain, Jr., one of the members of Bain & Co., the note of which latter firm was taken up, was a partner of Bain & Bro. His individual note was also one of those taken up. R. T. K. Bain, whose two notes were taken up, was a partner. But David A. Bain, deceased member of the firm of Bain & Co., or his representative, was not a partner. And James G. Bain and Thomas A. Bain, no note of either of whom was taken up, were partners. Thus, neither all the Bains whose notes were taken up were partners in Bain & Bro., nor were the notes taken up notes of all members of the firm. Bain & Bro., therefore, the defendants in this bill, are not identical with those Bains who received benefit from the transactions which were made the subject of formal entries in the books of the society on June 4th, 1872; and the allegation of the bill in that particular, also, is disproved.

As to *parties*, therefore, I do not see how the bill can, by construction, be so enlarged in its scope as to be treated as a bill brought under Section 35 for the *property, or its value*, transferred in violation of its provisions on the 4th June, 1872, that property being the notes held by the bank of Bain & Co., George M. Bain, R. T. K. Bain, and others, and delivered on that day by the society to Bain & Bro., as agents or trustees of the several makers. Generally the prayer for general relief in a bill has great aptitudes; but the india-rubber properties of the prayer for general relief in this bill are inadequate to give it such a scope.

Nor does the difficulty stop here. The curtails and discounts made for H. Wilson, the Westwood note, the Brownley notes, the Bilisoly notes, and the Campbell note were part of the property transferred in like manner with the notes of the Bains; and these several persons who all received the benefit of the transfers are in no manner parties to the bill; nor is Mrs. Mary J. McRae. And even if they were parties, as they should be, if the bill were drawn to embrace the parties to all the checks, the payment of which is complained of in the bill, it would be hopelessly multifarious. Considered, therefore, with reference to the recovery authorized by Section 35, the bill is incurably defective in respect to parties defendant, in failing to bring them before the court.

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As to subject-matter, the bill does not pray that the transfers of the notes and credits which have been described may be decreed to be void, and does not seek the recovery of this property or its value, either in its language, or its intendment, or in any possible construction that can be given to it. Even, therefore, if all the parties to the transfers of property which, or its value, the bill ought to have sought to recover back, had been brought before the court by the bill, and the bill had not become fatally multifarious thereby, still it would be defective in not praying in terms for the recovery of the *property* which was transferred; or, failing that, in not in terms alleging *its value*, and in terms praying the recovery of that value.

I have examined all the cases of suits founded upon the 35th section of the Bankruptcy Act, which have as yet been reported as decided by the Supreme Court of the United States; and with only two exceptions, in which there was plainly no necessity for its so being, the proceeding was by bill and brought in equity, because the bills all prayed the court to set aside the transfers or payments they complained of as void, and it was necessary to make all the persons connected with the transactions, parties to the proceedings. These cases are: *Toof v. Martin*, 13 Wall., 41; *Traders' Bank v. Campbell*, 14 Wall., 87; *Tiffany v. Lucas*, 15 Wall., 410; *Buchanan v. Smith*, 16 Wall., 277; *Wager v. Hall*, 16 Wall., 584; *Allen v. Massey*, 17 Wall., 352; *Wilson v. City Bank*, 17 Wall., 473; *Bartholow v. Bean*, 18 Wall., 635; *Cook v. Tullis*, 18 Wall., 332; *Tiffany v. Boatman's Int.*, 18 Wall., 376; *Mays v. Fritton*, 20 Wall., 414; *Bayley v. Glover*, 21 Wall. 342; *Clark v. Islen*, 21 Wall., 360; *Michaels v. Post*, 21 Wall., 398; *Watkins v. Taylor*, 21 Wall., 378; *Burnhisel v. Firman*, 22 Wall., 170; *Amsinck v. Bean*, 22 Wall., 395; *Sawyer v. Turpin*, 1 Otto, 114. One of the points decided in *Smith v. Mason*, 14 Wall., 419, is, that as strangers to a bankruptcy proceeding could not properly be affected by the summary process used in a bankruptcy court, and yet are necessary parties where it is sought to set aside transactions under the 35th section, in which they have participated, plenary proceedings must be brought for that purpose in the district or circuit court, or other court of terms. I am bound, therefore, in view of all these con-

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siderations, to hold that on the principles of pleading, and the law and evidence of this case, the bill is, in its form and scope, on the issue joined, fatally defective, and must be dismissed.

2. I think it proper, however, though technically unnecessary, to pass also upon the case presented, with reference to its merits. I shall suppose the case to stand upon the transactions represented by the check for \$14,499, dated on the 4th of June, 1872, which was used to take up the four notes of several of the Bains, which have been mentioned, to pay off balances on three notes of Bilisoly, and to take up the note of J. B. Campbell. The taking up of these four last-named notes, which were debts of persons wholly irresponsible, and which were worth nothing to the society in strict right, and which were voluntarily paid by some one or more of the Bains, was an unqualified benefit to the society, cannot be complained of, could not have worked a preference as against the creditors of the society, and may as well be dismissed from consideration, and I do dismiss them.

The notes of the Bains which they were allowed to take up in the same transaction, and which aggregated in principal and interest \$13,317.94, were worth dollar for dollar; and the question on the merits of the case is, whether or not, under the circumstances under which they were taken up, the transaction was void under the provisions of the 35th section of the Bankruptcy Act, Section 5128 of the Revised Statutes.

I am confronted in the consideration of this question by the orders of the bankruptcy courts, adjudicating the Portsmouth Saving Fund Society a bankrupt, the order in bankruptcy of the Circuit Court having expressly recited the transaction of the society with J. G. Holladay as an act of bankruptcy, and that transaction having been had on the 4th of June, 1872, the same day on which the check of Bain & Bro., for \$14,499, was used for taking up the notes which have been described.

The bankruptcy courts, however, acted on a more or less technical view of the case, and on a very limited presentation of facts compared with the thorough development of them which now enlightens this court. The parties benefited by the transaction were not before the courts of bankruptcy. The case is now before a court of equity, which considers every transaction

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in the light of its merits more than its technical features, and which renders its decrees in accordance with the dictates of substantial equity and justice. No actual fraud is pretended. The case is confessedly one of constructive fraud, and is heard in a court that will not subordinate the ends of justice to merely technical considerations. I do not consider myself precluded, therefore, by the orders of the courts of bankruptcy referred to, from considering and deciding this case with respect to its merits and irrespectively of the orders which were made by those courts.

In order that the transfer of the notes of the Bains, which are under consideration, should be void under Section 35 of the Bankruptcy Act, 5128 of the Revised Statutes, certain facts must coexist.

1. The society must have been insolvent within four months before the petition in bankruptcy was filed on 17th of June, 1872.

2. The transfer must have effected a preference, and *have been made for the purpose of so doing.*

3. The persons receiving benefit by the preference must have had reasonable cause to believe the insolvency of the society.

4. And also to know that the object of the transfer was to give them a preference. *Toof v. Martin*, 13 Wall., 40; *Clark v. Isen*, 21 Wall., 360, and *Mays v. Fritton*, 20 Wall., 414.

I shall examine the case only with reference to the *society's knowledge of its insolvency*, and to the question whether the transaction of 4th June, 1872, was made *for the purpose of securing a preference for the Bains*. The other points are conceded.

The term insolvency is not always used in the same sense. It is sometimes employed to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. *Toof v. Martin*, 12 Wall., 40. This is the sense in which the term insolvency is used when applied to persons who are not traders, and are not engaged in mercantile, banking, and financial pursuits, carried on principally by the means of negotiable paper. As to persons engaged in pursuits carried on by the use of such instruments, the term insolvency means an inability to pay off or take up that sort of paper in the ordinary course of business.

Now this society of Portsmouth had long ceased to be engaged

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in the latter sort of business; and for seven years preceding the filing of the petition in bankruptcy against it, had been engaged in the sole business of liquidating its affairs. Whether it was insolvent, therefore, was simply a question whether its assets could be so managed as to liquidate its debts. All persons had been dealing with it for seven years on that basis; and as against any of those persons it would be grossly unjust to treat the question of the society's insolvency upon any other basis of inquiry.

The orders in the courts of bankruptcy against it were based on the belief of those courts that up to June 17th, 1872, it was a *bank* engaged in the business of *banking*, whose solvency was to be determined by the inquiry whether it was paying over its counter all obligations to depositors and note-holders as they were presented. The evidence which has now been taken in this cause shows that the courts of bankruptcy were misinformed on that head. The society had not been a bank carrying on the business of banking since 1862.

Whether the society was insolvent, therefore, in the sense stated by the Supreme Court as above, was a question which must be admitted to have been undetermined up to the 12th June, 1872, when the committee, which eight days before had been appointed to look into its affairs, and to report with reference to this very question of doubt, made their report. It is the bankrupt who must know his insolvency. Up to that time it had been a mooted question, even among the officers and directors of the society, whether the corporation would be able to pay itself out of debt.

The committee which was commissioned to thoroughly investigate, inquire into, and report upon the question of insolvency, was appointed on the 4th June, 1872, the date of the transfer of the four notes of the Bains on the check of Bain & Bro., which is now under consideration, and, of course, had not then reported. The society, therefore, did not then know its insolvency; and the next and the vital inquiry is, whether the transaction of June 4th, 1872, was made *for the purpose*, on the part of the society, *of giving a preference* to those Bains who owed the notes.

It is in evidence that the notes of the Bains had been consid-

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ered as settled by the large deposits bought for the purpose, which had stood as an offset against them to the credit of Bain & Bro. since as early as the summer of 1870. These deposits had been bought and placed to their credit for the purpose, and the notes had been left with the cashier, who, being the father of its members, possessed the unqualified confidence of the firm, in pursuance of the standing resolution of the board which had been in force since 1865, and which had somewhat the effect of a contract of the society with its customers, "that the cashier should receive the notes of the institution and checks for deposits in payment of any debts due the institution." This resolution was general, had been acted upon by the society, and not only by the Bains, but by nearly all the debtors of the society, and was still in force on June 4th, 1872.

Inasmuch, therefore, as the transaction had really been made in 1870, when no intention of giving or procuring a preference could have been entertained, the motive existing at that time was the real motive of the transaction, and gives interpretation to what was done on June 4th, 1872, both as to the society and as to the Bains.

It is also proved in evidence that the final entries which were made on the 4th of June, 1872, were made in consequence of the committee having been raised that day, and that they were made for the purpose, on the part of the cashier of the society, of placing the books of the society in a condition, cleared of all closed transactions, to show the real status of its affairs, so that the committee would have to consider only unsettled affairs affecting the question of its solvency or insolvency.

Finally, the idea and motive of giving or securing a preference is negated by the fact that part of the especial transaction under consideration was the voluntary settlement by Bain & Bro. of four debts due from Bilisoly and Campbell, aggregating about \$1000, which were worthless to the society, and could never have been collected from the persons owing them, the gratuitous settlement of them showing that a preference was not in the mind or motive of Bain & Bro. or of the society.

The circumstances of the case all go to show the truth of the evidence I have mentioned. Instead of proving an intent to give

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or obtain a preference, the evidence really proves that no such an intent existed. The transaction simply conferred upon the Bains a privilege that had been conceded to and had been enjoyed by debtors owing obligations to the extent of \$200,000 to the society. For the society to have refused to make the transaction would have been to give all of those debtors a preference over the Bains. The allowance of the transaction by the society, so far from giving the Bains a preference, was simply allowing them the same benefit that had been allowed others to ten or twenty times the amount.

A recovery in this suit against Bain & Bro., after omitting to bring suits for other transactions of like character which were made within four months of the bankruptcy, to the amount of \$8207, would work a preference in favor of the persons benefited by these last-named transactions, and a discrimination against Bain & Bro., so that a suit brought to set aside a preference would itself, if successful, work a preference against these defendants of the very character which it seeks to condemn.

The evidence in the case proves that the intent and purpose of the transaction of the 4th June, 1872, was not to give or obtain a preference, but was other than that, and fair, honest, and legitimate on the part of the society and the defendants in this cause. The transaction had really been concluded, except in form, two years before, when no design of giving or obtaining a preference, in evasion of the Bankruptcy Law, could have been entertained, and it was had in pursuance of an honest contract or understanding which the society had made with its customers, which its venerable cashier had uprightly fulfilled with all who complied with its terms, and which was in full force on 4th June, 1872.

A court of equity will not, for the sake of making out a case of constructive fraud, disregard honest intentions, which are proved, and cast about ingeniously to find dishonest ones, which can only be inferred. I disdain such an office in this case, and upon the merits decide that the bill must be dismissed.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia, at
Norfolk.*

**HARMANSON, ASSIGNEE OF THE PORTSMOUTH SAVING FUND
SOCIETY, v. SAMUEL M. WILSON *et als*.**

The Act of Assembly of Virginia, allowing an abatement of interest which accrued during the late civil war, does not contravene the clause of the national Constitution which forbids the States from passing laws impairing the obligation of contracts, this State having always and continuously reserved the discretion to juries of allowing or disallowing interest, interest not being a subject of common law right, but of legislative permission.

BILL of foreclosure in equity.

This bill is brought to subject certain real estate of the defendant, Wilson, to the payment of two notes held against him by the assignee of the Portsmouth Saving Fund Society, now in bankruptcy, secured by deed of trust.

One of the two notes is for the sum of \$3450, dated February 4th, 1862, which was given in renewal of other notes which commenced before April, 1861. The other note, given in like manner for notes beginning before April, 1861, is for the sum of \$2990, and is dated on the 29th November, 1870.

The defendant, Wilson, makes no opposition to the prayer of the bill, except that he claims that interest be not charged against him for the period of the late civil war. The fact that the last note was given in 1870 does not conclude the maker of it from claiming an abatement of war interest, a statute of Virginia (Code of 1873, ch. 139, Section 7, page 982) allowing such abatement, even after judgments have been rendered, upon motion in the courts rendering them.

The question of the abatement of interest was argued by James E. Heath, Esq., for the complainants, and by the defendant, Mr. Samuel M. Wilson, and Messrs. Baker and Walke for the abatement. Their respective briefs are here given.

Argument for plaintiff.

Mr. Heath's brief :

The defendant, Wilson, claims that the interest on the debts sued upon for the period commencing April 17th, 1861, and ending April 10th, 1865, shall be remitted.

He relies upon an act of the legislature of Virginia, passed session 1872-73. (See Acts 1872-3, ch. 353, p. 344; V. C. 1873, ch. 173, p. 1120, Sec. 14.) The contracts sued upon are negotiable notes, made by the said Wilson, payable sixty days after date, dated February 4th, 1862, and November 29th, 1870, respectively. As to the debt dated 29th of November, 1870, it is alleged the consideration accrued prior to the 10th day of April, 1865.

Interest is demandable and recoverable in all cases where there has been either an express or implied contract therefor.

The obligation to pay interest, where it is implied from the nature of the contract, is as strong and binding as where the obligation is contained in the contract, and in both cases interest is a necessary incident to the original debt, and a matter of strict right, which must be allowed by the court.

A contract to pay interest will be implied either from general mercantile usage or custom, as in the case of bills of exchange and promissory notes, upon which, in the absence of any other agreement, interest runs from the day of maturity and payment; or from the demand, if they be payable on demand; or from the issuing of the writ, where no demand is made; or it will be implied from the particular course of dealings between the parties, or the special custom of one party, known and acceded to by the other. So also where, by the terms of an agreement or contract, the principal is to be paid at a specific time, an agreement is always implied to make good any loss arising from default of payment at the proper time, by the payment of interest after such default. *Page v. Newman*, 9 Barn. & Cres., 378; *Foster v. Weston*, 6 Bing., 799; *Colton v. Bragg*, 15 East., 223; 1 H. & M., 211; *Wood v. Hickock*, 2 Wend., 501; *Robinson v. Bland*, 2 Burr., 1086; 3 Cow., 436.

The foregoing authorities establish the doctrine, that interest upon contracts silent as to interest, is as much a part of the principal, after maturity or day of payment, or from demand, if they be payable on demand; or from the issuing of the writ,

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where no demand is made ; or from the day upon which, according to the contract, the principal is to be paid, if a day be appointed, as contracts which, upon their face, expressly provide for interest ; and, in both cases, where implied and where expressed, interest is a matter of strict right, and must be allowed by the court.

Interest, then, being the fruit of the principal, it being a part of the contract, expressly or by implication, does the act of April 2d, 1873, upon which the defendant, Wilson, relies, constitute such a defence as should be respected by the courts?

It will be observed that the act of the legislature applies to suits for the recovery of money founded upon contracts, express or implied, or on causes of action, or on liabilities, which were entered into or existed, or where the original consideration accrued prior to the 10th day of April, 1865.

The Constitution of the State (art. 5, sec. 14) provides that the General Assembly shall pass no law impairing obligation of contracts, etc. ; and the Constitution of United States (art. 1, sec. 10) provides that no State shall pass any law impairing the obligation of contracts, any *ex post facto* law, or bill of attainder.

This act of 1872-3 is confined, by its very terms, to a class of cases existing prior to its enactment ; in other words, it acts retrospectively entirely.

It impairs the obligation of the contract by changing the rights of the contracting parties thereto, authorizing the debtor to pay less by \$6 on the \$100 for four years than he contracts to pay, and obliging the creditor to receive that much less than he contracted to receive.

In *Planters' Bank v. Sharp et als.*, 6 How. 301, 327, Justice Woodbury says : "One of the tests that a contract has been impaired, is that its value has, by legislation, been diminished. *It is not, by the Constitution, to be impaired at all.* This is not a question of degree, or manner, or cause, but of encroachment in any respect on its obligation, dispensing with any part of its force."

Again, the Supreme Court of the United States says : "Any law which enlarges, abridges, or in any manner changes the intentions of the parties, resulting from the stipulations in the

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contract, necessarily *impairs* it. The manner or degree in which this change is effected can in no respect influence its conclusion ; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs the obligation, though it may not do so to the same extent in all supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute and apparently immaterial in their effect, impairs its obligation." *Ogden v. Saunders*, 12 Wheat. R., 213, 327 ; *Green v. Biddle*, 8 Wheat. R., 1, 84.

It will not be contended that the contracts to which the statute in question applies, are not diminished in value, nor that the intentions of the parties to said contracts are changed, nor that the validity, construction, and discharge of said contracts are materially affected, nor that there is a plain deviation from the terms of the contract by an imposition of conditions not expressed in the contract, nor that a portion of the conditions of said contracts are dispensed with.

The meaning of that provision of the Constitution of the United States which forbids a State passing any law impairing the obligation of contracts as construed and defined by a series of decisions of the Supreme Court, extending from 1810 to 1871, is that the laws existing at the time and place of making the contract, and of the place where the contract is to be performed, are as much a part of the contract as if they were incorporated by express words into the contract.

That the State may alter at will whatever belongs *merely* to the remedy ; provided, the *alteration does not affect the value of the contract, or in any way impair its obligation. But if the value of the contract is lessened by changing the remedy, then the Constitution is violated just as much as if the legislation complained of affected directly the contract itself.* *McCracken v. Hayward*, 2 How., 608 ; *Green v. Biddle*, 8 Wheat., 1 ; *Sturgis v. Crowningshield*, 4 Wheat., 122 ; *Fletcher v. Peck*, 6 Cranch., 87 ; *Von Hoffman v. City of Quincy*, 4 Wall., 553 ; *White v. Hart*, 13 Wall. The Supreme Court of this State have, at all times upon

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similar questions, been controlled by the decisions of the Supreme Court of the United States in the foregoing cases, and have but recently reaffirmed them in the cases of *Taylor v. Stearns*, 18 Gratt., 244; *Bank of the Old Dominion v. McVeigh*, 20 Gratt., 457; and the *Homestead Cases*, 22 Gratt., 266.

The facts in *Taylor v. Stearns* were these: G. A. W. Taylor conveyed to James M. Taylor and John Enders, by deed dated 19th of September, 1860, a house and lot in the city of Richmond, to secure the payment of \$13,299.55, due by ten negotiable notes, bearing even dates with said deed, and payable each at six months after the next preceding. In 1866 the trustees advertised the house and lot for sale, and the grantor thereupon applied to the Circuit Court of Richmond for an injunction to stop the sale, on the ground that the General Assembly, at the session of 1865-6, had passed an act providing that there should not be any sales under deeds of trust for the payment of money (except in certain specified cases, of which this was not one), until 1st day of January, 1868. Acts of 1865-6, p. 179.

The injunction was granted, and at the hearing was dismissed, upon the ground that the Act of Assembly relied upon by the grantor was contrary to the provision of the Constitution of the United States which forbids the passage of a law by a State impairing the obligation of contracts, and upon an appeal to the Court of Appeals, the decision of the court below was unanimously affirmed.

Rives, J., in delivering the opinion of the court in that case, says: "The constitutional prohibition applies to all contracts, whether verbal or written, express or implied, executory or executed; whether between individuals, corporations, States and individuals, or between separate States." P. 275.

The law of the General Assembly, declared to be unconstitutional by the Court of Appeals, in *Taylor v. Stearns*, was a law which simply postponed the creditor in the collection of his debt. It did not prohibit the collection of any part of the debt, but declared that a certain class of debts should be collected, after notice by the creditor, in instalments of one, two, and three years. If that act, which postponed the creditor in the collection of his

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debt, defeated the agreement of parties and impaired the obligation of the contracts to which it applied, we respectfully submit, that the act relied upon by the defence in this suit is much more plainly in violation of the Constitution, because the intention of the parties is not only defeated, but a portion of the contract is entirely abrogated and annulled.

The agreement, as evidenced by the contracts sought to be enforced in this suit, was that the principal was to be paid on the days specified for the payment in the contracts, and if not paid on the days of payment, then the implication was that the principal sum should bear interest, at the rate of six per centum per annum, till paid. The laws of this State, existing when these contracts were entered into, made them valid contracts; no subsequent acts of the legislature can diminish or enlarge the express contract then made to pay the principal, and the implied contract to pay interest if the principal was not paid when due, without defeating the intention of the contracting parties and impairing the obligation of the contracts. *Chicago v. Sheldon*, 9 Wall., 50, 55; *Bank of Old Dominion v. McVeigh*, 20 Gratt., 466.

The history of the question of interest is a very interesting one. It seems that, by the ancient common law, no interest was allowed for the use of money; and Hume, in his History of England, at chapter 33d, says: "In 1546, a law was, for the first time, passed fixing the interest of money at ten per cent. Formerly all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and criminal."

Mr. Jefferson (American State Papers, vol. i (1st ed.), p. 307) says, that "in England all interest was against law until the statute of 37 Henry VIII." And his confidence in the correctness of this statement is strengthened by the fact that, up to this time, the Roman Catholic religion prevailed in England, and interest was unlawful in all Roman Catholic countries.

The statute referred to of Henry VIII is not an *affirmative*, but a *negative* statute; it provides that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds, for one whole year."

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All statutes passed since, in England and in this country, are of the same character. They are negative, not affirmative; they do not declare in what cases interest shall be taken, much less do they, in any case, require it to be paid. It follows then, necessarily, that interest is a matter of agreement, since all liability must be fixed by law or by agreement, and we have seen that the law does not require interest.

If the above position be correct, we must conclude that the allowance of interest by the courts as an incident to the debt, as a fruit of the principal, is founded exclusively upon the agreement of the parties. *Colton v. Bragg, supra*. This agreement, as we have before said, may be expressed in writing or by words, or it may be implied, and is as binding and as invariably assessed in cases where it arises by implication as where it is in writing or expressed in words.

The agreement, as we have seen, may be implied :

1st. From the custom or usage of the business in which the debt is contracted. When such custom is known to the parties, or may reasonably be presumed to have been known, it enters into the original contract, and forms a part of it.

2d. When the principal is to be paid at a specific time, the law always implies an agreement to make good the loss arising from a default, by the payment of interest. Per Lord Mansfield, in *Robinson v. Bland*, 2 Bur., 1086. It is a maxim universally acknowledged and acted upon, that, where interest does not run with the principal, none accrues until default is made in payment.

"All contracts to pay undoubtedly give a right to interest from the time the principal ought to be paid." Lord Thurlow, in 2 Bro. C. C., 3; *Colton v. Bragg*, before cited.

3d. Where an account has been liquidated by both parties, and the debt therefore becomes due and payable, it carries interest on the same ground of a debt payable at a specific time: there is an implied contract to pay. *Boddam v. Ryley*, 2 Bro. C. C., 3; 1 P. Wms., 376; 7 John. R., 213; 3 Wils., 205; 15 John., 424.

4th. Where an account has been rendered, and the debtor, during a reasonable time for that purpose, makes no objection, it may be presumed that he has acquiesced in its correctness, and it

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then becomes a liquidated account, and carries interest from the time of such presumption. 2 Ves., Sen., 239.

In the foregoing enumerated class of cases, and others of a kindred nature, interest is considered and treated by the courts as a necessary incident to the principal, and allowed as a matter of right.

But there is another class of cases where interest is not a matter of right, where it is not an incident of the principal, and where properly and necessarily it is left to a jury, in its discretion, to be allowed or not; and when this discretion is fairly exercised, the courts will not interfere with the verdict.

It is to this class of cases that our statute (V. C., 1873, ch. 173, § 14, p. 1120, to which the act of '72-'3—relied upon by the defendant, Wilson—is an amendment, and which has been the law of this State since the Code of 1819) is intended to apply, and does apply. The class of cases of which we are now treating, and which, we insist, are included and controlled by our statute, differ widely, and must be distinguished from those cases where interest is allowed by the courts as an incident of the principal, and as a matter of strict right. The confusion and difficulty which seem to exist upon the question of interest grow out of the mingling of these classes. They are entirely independent of each other, and the principles which govern and control them bear no analogy to each other.

Interest is a question in the discretion of the jury, and is allowed by way of damages or punishment, where the debtor has been guilty of fraud or injustice, or some injury has been done; and in such cases the legal rate of interest is assumed as the rule or measure of damages. Thus, in actions of tort, technically so called—as in trover, detinue, or in trespass—interest may be allowed by way of damages, by the jury (14 John., 128, 385; 13 Gratt., 219, 454, 461; 11 Leigh, 219); in actions *ex contractu*, as in covenant for breach of covenant; in *assumpsit* to recover money improperly retained and withheld from the rightful owner, as in the case of an attorney collecting the money of his client and failing to pay it over, or a sheriff collecting money on an execution and misappropriating the money thus collected, and on penal bonds. So in cases where an agent makes advances to

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his principal, or the principal to his agent, and in cases of fiduciaries receiving money and making no disposition of the same for an unreasonably long time, or innocently misapplying the funds in hand,—in all these cases, and those of a like character, the question of interest is left to the discretion of a jury under the advice of the court, and that discretion, properly exercised, will not be disturbed by the court.

Our statute before referred to applies to such cases as we have enumerated, and not to cases where interest is a part of the debt by expression or by implication. The rule by which the two classes of cases are to be distinguished is thus stated in *Rensselaer Glass Factory v. Reid, Adm'x, etc.*, 5 Cow., 616: "Where money has been lent, advanced, or expended by request, and under an agreement to pay at a specific time, or when it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; and so, also, where the money is not to be refunded at a particular time, but a default arises from a demand, or notice, the same principle will apply. But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems it should be referred to a jury to determine whether damages shall be given by an allowance of interest."

The facts of this case show conclusively that it is not one of that class in which a jury could allow interest in its discretion, because:

1st. The contracts are payable at a specific time and place.

2d. The notes evidencing the indebtedness are negotiable: the maker, at the time of their execution, a citizen of Virginia, residing at Portsmouth; the contract made in Portsmouth, and payable in Portsmouth; and according to the custom and usage of the bank holding these notes, and the custom and usage of such transactions in Virginia (which custom and usage was known, or presumed to be known, to the maker), interest accrued and was payable from the day upon which the notes fell due.

3d. Wilson has already made a payment upon each of said notes, to be applied (and which has been applied) to the extinguishment in part of the interest.

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4th. The deeds of trust executed by Wilson to secure these debts, or his indorsers for these debts, and which under the law enures to the benefit of the holder of the notes, provide for the securing of the principal and interest.

The cases cited by Mr. Wilson in his note have no application to the case at bar.

McCall v. Turner (1 Call., 115) was an action upon a bond for penalty; and all the judges who delivered opinions in that case use the following language: "The act of Assembly has altered the common law; and by allowing the *penalty* to be discharged by the payment of the principal and interest due thereon, necessarily turns the *quantum* into a question to be determined by circumstances; and it is the province of the jury to decide that question."

The plaintiff, McCall, purposely absented himself from the country, and remained absent during the Revolutionary war, and left no authorized agent to act for him. *He* put it out of the debtor's power to pay the interest.

It will be observed, in the first place, that the instrument sued upon, the character of the contract, in *McCall v. Turner*, is of that class on which, by the act of Assembly, interest is left discretionary with the jury; and in the second place, the plaintiff, by his own voluntary act, had placed himself, not only beyond the reach of the defendant or debtor, but was a citizen of the British government, between which and the debtor's government war existed for about eight years, the result of which was the establishment of an independent government for the country of the debtor.

In the case at bar, as we have before shown, the debts sued upon are of that class in which interest is a strict matter of right after maturity; and the holder of these debts, the Portsmouth Saving Fund Society, a body corporate under the laws of Virginia, doing a banking business in the city of Portsmouth, never changing its place of business, much less placing itself beyond the reach of its debtors.

If the debtor voluntarily places himself where he cannot communicate with his creditor, and by consequence renders himself unable to pay his interest, surely the law, which would exempt

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from the payment of interest where the creditor absents himself from the country and places it beyond the power of the debtor to pay, will compel the debtor to pay where the default has happened by the act of the debtor himself.

Brewer v. Hastie & Co., 3 Call, 21, was a suit in chancery brought to settle up a long running account between the parties, in which there were mutual credits and debits, and no balance struck (a case eminently proper for the exercise by the court of a discretion in fixing the time from which interest shall run); and when the debtor sought his creditor to pay his debt, he found he had left the country. The court, upon the authority of *McCall v. Turner*, decided interest should be abated during the war. The creditors, Hastie & Co., were British subjects.

Ambler's Executors v. Mucon et al., 4 Call., 605, does not bear upon the question at issue here. The expression used by the court in this case, that "interest, during the war, ought not, in justice and equity, to have been allowed," etc., . . . was not necessary in establishing the principles governing the case under consideration, not acted upon in the decision of the case, and cannot therefore be relied upon as settling or establishing any principle.

The citations from the letter of Mr. Jefferson to Mr. Hammond (1 American State Papers, pp. 307-312) are interesting and improving, but are not law for this court. The views therein presented were in answer to the charge that the government of the United States had not kept the treaty of peace, inasmuch as our courts had refused to allow interest to run on debts due British subjects during the war. Some of the views expressed in this letter upon the subject of interest are sound, and some in conflict with a long series of decisions of the Supreme Court of the United States since made and hereinbefore referred to.

Mr. Jefferson says that "interest is no part of the debt; that an assignment of the debt does not necessarily carry interest upon the debt; and that interest depends altogether on the discretion of the judges and jurors" (p. 307). We have seen that in many cases interest is a part of the debt, following the debt, and recoverable as a matter of strict right.

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The cases relied upon by the defendant, Wilson, establish that interest accrued during the Revolutionary war upon debts due by the citizens of this country to those of the British government, where the creditor placed it out of the debtor's power to pay interest, ought properly to be abated.

Chief Justice Chase, in *Shortridge et al. v. Macon*, decided in the Circuit Court of the United States for North Carolina, in 1867, allowed interest during the late war upon a debt due citizens of Pennsylvania by a citizen of North Carolina. He uses the following language: "It is claimed, however, that whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they cannot recover interest for the time during which war prevented all communication between the States in which they respectively reside. We cannot think so. Interest is the lawful fruit of principal. There are, indeed, some authorities to the point, that interest which has accrued during war between independent nations cannot be afterwards recovered, though the debt, with other interest, may be; *but that rule, in our judgment, is applicable only to such wars.*"

We are told by the defendant, Wilson, in his answer, that the notes held by the plaintiff, and sought to be enforced in this suit, are renewals of notes executed prior to the 17th day of April, 1861. We are also informed by him that the confederate forces evacuated Portsmouth about the middle of May, 1862, and that he remained within the confederate lines from that time until the termination of the war. The record shows, then, at the date of the maturity of said debts, when they were payable, and for some time thereafter, the maker was in Portsmouth, where the holder was doing business, and nothing prevented the payment of the debts.

The Supreme Court in *Ward v. Smith*, 7 Wall., 447, held as follows:

1. The designation of a bank as a place of payment of a bond, imports a stipulation that its holder will have it at the bank when due, to receive payment, and that the obligor will produce there the funds to pay it.

2. If the obligor is at the bank at the *maturity* of the bond, with the necessary funds to pay it, he so far satisfies the contract

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that he cannot be made responsible for any future damages, either as cost of suit or interest for delay.

(The opposite of the proposition last stated must be true, and the party, under such circumstances, seeking a rebate of the interest, should show, that on the day of *maturity*, he was ready, and at the *place* named, to discharge the debt.)

The court further held, in *Ward v. Smith, supra*: If the rule that interest is not recoverable on debts between alien enemies, during war of their respective countries, is applicable to debts between citizens of States in rebellion, and citizens of States adhering to the National government in the late civil war, it can only apply when the money is to be paid to the belligerent directly; it cannot apply where there is a known agent appointed to receive the money, resident within the same jurisdiction of the debtor. *In the latter case, the debt will draw interest.* Mr. Wilson, in his answer, says, that the amount due on the 17th of April, 1861, on the note of indorser, Arthur Emmerson, was \$3400, and this amount remained due as principal until the 10th day of April, 1865. On the 17th day of August, 1865, he paid to the Portsmouth Saving Fund Society, the sum of \$892.76, and on the 15th of November, 1867, he paid the further sum of \$554.24. These payments were made in gross, but credited to the note indorsed by Arthur Emmerson, as shown by statement filed and marked Exhibit "A." He claims a rebatement of the interest on the original debt of \$3400, indorsed by Emmerson, from the 17th of April, 1861, to 10th of April, 1865. The position taken by Mr. Wilson with reference to the abatement of interest on this debt is wholly untenable.

Statement "A," filed with his answer, shows, and he himself says, that the payments which he made in 1865 and 1867, were applied by the cashier, Mr. Bain, with his consent, to the extinguishment of the interest first, and then of the principal of the debt indorsed by Arthur Emmerson. The interest on this debt ceases to be a question, the rights of the parties relating to the interest have been adjusted—it has been paid. The parties who settled it were competent to settle it; they had a right to settle it; they have settled it; rights have become vested by the

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settlement ; property acquired by the bankrupt, or its creditors in the interest, and the contracts thus made, rights thus acquired, cannot be annulled, violated, divested. These payments cannot be disturbed. If a creditor holds two claims against his debtor, and the debtor makes a payment, and directs to which debt the payment shall be applied, it must be so applied, and the law will not permit any change in the application ; so, if the debtor fails to make the application, and the creditor exercises his right to apply the payment in the absence of instruction from the debtor, the application once made is final, irrevocable ; or, if both creditor and debtor fail to make the application of the payment, the law makes it, and both parties are bound by the direction of the law. *Hill et al. v. Sutherland's Executor*, 1 Wash., 133 ; 4 Cranch, 320 ; *Kirkpatrick v. United States*, 9 Wheat.

In the case at bar, the payment was made to the extinguishment of that portion of the debt which the law requires shall be first satisfied, to wit, the interest. It is a much stronger case than could arise under the doctrine of the application of payments for the non-interposition with rights of parties once settled and adjusted.

S. M. Wilson, for defendant.

Interest is no part of a debt, unless made so by special contract to pay interest ; and the allowance of interest, both in England and the United States, has, as a general rule, been left discretionary with the courts. This is shown by the whole current of legislation on the subject in Virginia, from the earliest periods in the history of the Commonwealth down to the present time. In the year 1730, interest was fixed at six per centum per annum. 4th Hen. Stat. at Large, p. 194. In the year 1734 it was reduced to five per cent., and this, by successive legislation, was continued the rate until the 1st of May, 1797, when the rate was restored to six per cent. In the Code of 1819, 1 Rev. Code, p. 508, we find it enacted that "in all actions founded on contracts, when judgment shall be rendered in court, *if interest be allowed*, such interest shall be upon the principal sum due, and shall continue until such principal sum be paid ; and on all ac-

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tions founded on contracts, and tried before a jury, the jury shall ascertain the principal sum due, and fix the period at which interest shall commence, *if interest be allowed by them*, and judgment shall be rendered as carrying on interest till the judgment shall be satisfied."

In the Code of 1849, p. 673, it is enacted that "the jury, in any action founded on contract, *may allow interest* on the principal sum due, or any part thereof, and *fix the period at which such interest shall commence*. And in any action for a cause arising hereafter, whether from contract or from tort, the jury *may allow interest* on the sum found by the verdict, or any part thereof, and *fix the period at which said interest shall commence*. If a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly." This same section was re-enacted in the Code of 1860, p. 732, and again re-enacted in the Code of 1873, p. 1120, with a proviso "that in all suits for the recovery of money, founded on contracts, express or implied, or on causes of action or liabilities, which were entered into or existed, or where the original consideration accrued prior to the 10th day of April, 1865, it shall be lawful for the court or jury, by whom the suit may be tried, to remit the interest upon the original debt found to be due, or any part thereof, for the period commencing on the 17th day of April, 1861, and ending on the 10th day of April, 1865, or for any portion of said period."

These acts are cited to show how fully and continuously the question of interest has been kept in the control of the legislature, and submitted by it to the discretion of the courts, in which it rested at common law, and how clearly and continuously it has recognized interest as no part of a debt, by leaving the allowance of it to the discretion of courts and juries. As to the disallowance or remission of interest during the late war, authorized to be made by the courts or juries by the Code of 1873, as quoted above, the act is but an affirmance of the law as recognized and declared by the Court of Appeals, the highest judicial tribunal we have in Virginia, in cases carried before it subsequent to the war of the Revolution. In the case of *McCall v. Turner*, 1

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Call., p. 115. This was a case in which the jury of the District Court of King and Queen County found a verdict for the principal of the debt claimed, and interest thereon from the date of the bond to the 19th day of April, 1775, and from the 19th day of April, 1783, till paid, thus remitting interest during the period of the war of the Revolution. From the judgment of this verdict an appeal was taken, and the judgment was affirmed without dissent from either of the judges of the Court of Appeals. In this case the creditor, during the war, from some time in the year 1775 to some time in the year 1783, was out of Virginia in parts beyond sea. Each of the judges, in delivering his opinion in the case, recognized the question of interest due as one to be decided by the jury, who, according to the language used by Judge Carrington, should say "when it should commence, how long it should continue, and when it should be suspended or extinguished." President Pendleton, in delivering his opinion in the case, says, "The only question, therefore, is whether interest during the war constitutes a *bona fide* part of the debt. And I do not hesitate to declare my opinion in the negative, whatever stigma may be attached to that opinion. Our situation at that period, attacked by a powerful nation, to whose government we had been subject, called for the exertion of every power, personal and pecuniary, in defence of life, liberty, and property; and without commerce (which had heretofore been monopolized by that nation) to enable our citizens to pay their debts, *takes the case out of every principle on which interest is demandable. The objection applies to all creditors, but a fortiori* against those of the nation who unjustly brought us into that situation." This case was decided in the year 1797 by the Court of Appeals.

In the year 1801 the case of *Brewer v. Hastie & Co.*, 3 Call., p. 21, was decided by the Court of Appeals in accordance with the decision in the case of *McCall v. Turner*, war interest for the eight years of the Revolution being disallowed by the court. The claimant of debt and interest in this case was a British subject, and non-resident of the Commonwealth. Following these cases comes the case of *Ambler's Executors v. Macon et al.*, 4 Call., p. 605. The Court of Appeals stated, in its decree in this case, that "*interest during the war ought not, in justice or equity,*

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to have been allowed on debts due to domestic creditors, no more than to foreign ; but since it has not been attended to, either in practice or judicial decisions, until so much business has been otherwise adjusted, it would be unjust at this late era to introduce it in a particular case, unless in one attended with peculiar circumstances." This last-named case was decided in the year 1803, twenty years subsequent to the close of the war of the Revolution.

In the three cases above cited no one of the judges of the Court of Appeals expressed dissent to the rulings of the court, and the decrees never having been reversed or overruled, stand among the judicial decisions as exponents of the law on the subject embraced by them, and fully sustain the principle that the question of allowing interest during war is at the discretion of the courts and juries. As said above, the act of 1873, giving legislative sanction to the disallowance of interest during the late war, is but an affirmance of the doctrine recognized and declared by the Court of Appeals, and only shows that the power to disallow interest during the war exists in the courts and juries, and was, no doubt, passed to indicate that the exercise of the power is required for the general good, and called for by right and justice.

From the language of the decree in the case of *Ambler's Executors v. Macon et al.*, 4 Call., it may be inferred that the question of interest running during the war was overlooked, in the majority of cases, immediately succeeding the war of the Revolution ; but this can be readily understood if we consider how few persons, comparatively, know the laws, though all are presumed to understand them. That the debts of private individuals then must have been slight, both in number and amount, compared with the mass of liabilities now resting on our people ; and that the people then having come through the war of the Revolution with their labor and social organization unchanged, and their property nearly intact, and with lands yielding generous returns to tillage, their power of recuperation must have been such as to leave but little necessity for any relief, save such as the creditor, in most cases, could easily extend to the debtor. The case is different now, when our people having recently passed through a war of almost unparalleled magnitude, during which a very

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large portion of the State has been laid waste and devastated, from which it is but beginning to recover, have yet the great bulk of their *antebellum* indebtedness to meet, while their whole system of labor has been swept away, and requires to be organized again, and farming, their main occupation, can barely be relied on for subsistence, and often fails in affording it.

The rate of interest is fixed by statute law, and particular cases are defined in which it may be allowed; but the law does not declare or make interest a part of a debt; and while laws are enacted for the construction and enforcement of contracts, they form no part of them (unless possibly of implied contracts), and this, though contracts when made are only valid and binding so far as they are in conformity with law, and, as a general rule, are made and to be construed under the laws and usages existing at the place and time they are entered into. There are probably, now, no contracts for the payment of money existing in Virginia which have not been made since the allowance of interest on contracts in suits brought on them has been submitted by express law to the discretion of the courts or juries. If I be correct, no party to any contract can complain of the provision of the Code of 1873, quoted above.

As to interest being no part of a debt at common law, I refer to Viner's Abridgment, title Interest, (c) § 7, and to Chitty on Contracts, title Interest, and cases cited there; and on this subject, and also as to interest not running during wars, involving general and national calamity, I ask to present the following extracts, made from a communication made by Mr. Jefferson, when Secretary of State of the United States, to Mr. Hammond, Minister Plenipotentiary from Great Britain to the United States, under date of the 29th May, 1792, and published in the American State Papers, vol. i, and to call attention to those portions of said communication from page 304 to 317, as containing the fullest exposition I have been able to find, both as regards interest forming no part of a debt at common law, and its not running during war, or other national calamity cutting off income, the source properly from which interest is payable. "Section 54, the treaty, is the text of the law in the present case, and its words are, that there shall be no lawful impediment to the

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recovery of *bona fide debts*. Nothing is said of *interest* on those debts; and the sole question is, whether, where a debt is given, interest thereon flows from the general principles of the laws. Interest is not a part of the debt but something added to the debt, by way of damage, for the detention of it. This is the definition of the English lawyers themselves, who say, 'Interest is recovered by way of damages, *ratione detentionis debiti*.' 2 Salk., 622, 623. Formerly all interest was considered as unlawful in every country in Europe; it is still so in Roman Catholic countries, and in countries little commercial." . . . "In England, also, all interest was against law, till the Stat. 37 Henry VIII, ch. 9. The growing spirit of commerce, no longer restrained by the principles of the Roman Church, then first began to tolerate it. The same causes produced the same effect in Holland, and perhaps in some other commercial and Catholic countries. But, even in England, the allowance of interest is not given by express law, but rests on the discretion of judges and juries as the arbiters of damages."

"And we may add, once for all, that there is no instrument or title to debt so formal and sacred as to give a right to interest on it under all possible circumstances. The words of Lord Mansfield, Dougl., 753, where he says, 'That the question was, what was to be the rule for assessing the damages, and that in this case, the interest ought to be the measure of the damage, the action being for a debt; but in a case of another sort the rule might be different;' his words, Dougl., 376, 'that interest might be payable in cases of delay, if a jury, in their discretion, shall think fit to allow it;' and the doctrine in *Giles v. Hart*, 2 Salk., 622, that damages or interest are but accessory to the debt, which may be barred by circumstances which do not touch the debt itself,—suffice to prove that interest is not part of the debt, neither comprehended in the thing nor in the term; that words which pass the debt do not give interest necessarily; that the interest depends altogether on the discretion of the judges and juries, who will govern themselves by all existing circumstances, will take the legal interest for the measure of their damages, or more or less, as they think right, will give it from the date of the contract, or from a year after, or deny it altogether, accordingly as the fault

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or the sufferings of one or the other party shall dictate. Our laws are generally an adoption of yours, and I do not know that any of the States have changed them in this particular. But there is one rule of your and our law, which, while it proves that every title of debt is liable to a disallowance of interest, under special circumstances, is so applicable to our case that I shall cite it as a text, and apply it to the circumstances of our case. It is laid down in Vin. Abr., Interest, c. 7, and, Abr. Eq., 5293, and elsewhere, in these words, 'Where, by a general and national calamity nothing is made out of lands which are assigned for payment of interest, it ought not to run on during the time of such calamity.' This is exactly the case in question. Can a more general national calamity be conceived, than that universal devastation which took place in many of these States during the war? Was it ever more exactly the case anywhere, that nothing was made out of the lands which were to pay the interest?"

In the history of the world, there probably has been no instance among civilized nations of a general or national calamity in which the people have been so deprived of available income while it was pending, or at its close left so little able to meet their engagements, especially the payment of interest which accrued while it lasted, as the people of Virginia have during and since the recent war. During the war they were barely able to secure subsistence for themselves and families, in many cases losing their entire property by the exigencies of the war, and called on by the State authority to contribute their time, means, exertions, and, in many cases, their lives, to the defence of the State. Since the war, through the abolition of slavery, a very large proportion of what constituted their productive property has been swept away; and resuming the cultivation of their lands, which had been ravaged and desolated by the war, without any organized system of labor, and without adequate circulating medium (now needed more than ever), which they have not the means to purchase, and are prohibited from creating, as they did before the war, their financial condition has been and continues worse than at any other period in our history.

If there ever existed cases in which interest accrued during war or national calamity should be disallowed, the cases which

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it was the object of the statute of 1873, above quoted, to reach, stand pre-eminent among them; and the facts adverted to above, and giving birth to the statute, appeal trumpet-tongued to the courts and juries, to whose discretion the question of allowing interest during the war is submitted, not to allow it.

Messrs. Baker & Walke united in the argument of Mr. Wilson, and cited the following additional authorities: Code of Virginia, p. 1120, § 14; decisions U. S. courts, declaring State laws unconstitutional, *Gilchrist v. Little Rock*, 2 Dillon, D. C., 261; 3 Peters, 280; 8 Peters, 88; 8 Wheat., 90-92; 6 Cranch, 128; 8 Wheat., 625, Dart. Col.; and 6 A. L. Reg., p. 220, in case of *Tucker v. Gill*, etc., decided by Dist. Court of Appeals at Petersburg, Judge Joynes.

HUGHES, J.—The exhaustive arguments of counsel in this case relieve me of the task of collating the authorities, or presenting any extended reasoning, upon the questions at issue.

I think that upon authority, as presented in the Virginia cases of *McCall v. Turner*, 1 Call, 115; *Brewer v. Hastie & Co.*, 3 Call, 21; *Ambler's Executors v. Macon et al.*, 4 Call, 605; *Edgar Tucker v. Watson*, *McGill & Co.*, 6 Am. Law Reg., 220; and the series of acts of Assembly by which this State has expressly and continuously, from the beginning, preserved to her juries a discretionary power over the subject of interest on money,—we may assume the law of this commonwealth, as between citizens thereof, to be, that interest during a period of war may be disallowed by a jury or a court without breach of contract. The legislature of Virginia, by a long series of acts, reaching down, in conjunction with acts of Parliament, from the time when, by express statute, the taking of interest on money at such rate as the statute expressly named was declared not to be usury, and was converted from a crime into a statutory privilege,—has reserved to itself the power to say first, through a jury, under what circumstances interest may be taken at all; and next, what percentage of interest shall be allowed. These statutes, and the decisions of her highest courts and ablest judges in the cases I have named, seem to me to settle the law of the subject for this commonwealth. The law may not be precisely the same in other States of the Union, or

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in England. The weight of authority elsewhere is probably in favor of the exaction of war interest; and the decisions of the Supreme Court of the United States in cases between other litigants than citizens of Virginia probably incline in the same direction; but a Federal court adjudicating between citizens of a State of the Union in cases where the *lex loci contractus* governs, is bound to follow the law of that State as interpreted by its courts of highest resort; and therefore I feel bound in this case to disregard contrary decisions on this subject which may have been made by the courts of other States, or by the Federal courts in adjudicating between citizens of other States, and uphold the Virginia statute, section 14, chapter 173, of the Code of 1873.* If I were to deny the power of the court or of a jury to disallow war interest in Virginia, I should have not only to nullify an act of Assembly which all courts of the State are now administering, but to disregard solemn decisions of its Supreme Court of Appeals, never overruled, and rendered at a time when that court commanded, probably more than at any other, the highest consideration among lawyers and jurists. (See *Infra* p. 237.) The only ground upon which opposition is or can be made to this provision of the code leaving it in the discretion of court and jury to allow or not interest during the period of the late war, is, that it impairs the obligation of contracts, and thus violates that clause of the National Constitution which prohibits the States from passing laws having such effect.

It is contended, however, in reply, that interest is not in all cases an obligation of contract, in the meaning of the clause of the National Constitution referred to. It is true that it is sometimes expressly provided for in the bond, promissory note, or other writing in which parties unite. In such cases, of course, the payment of it is an obligation of contract; and but for the fact that the taking of interest at all is wholly of legislative permission, and that that provision has been in Virginia continually coupled with a legislative reservation to juries of discretion over it, there could be no denial of the fact that the obligation was

* A decision of Judge Giles, of the United States Court, district of Maryland, disallowing war interest, is given elsewhere.

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protected by the provision of the National Constitution which has been named.

But in the large majority of cases interest is not payable by express contract. In a multitude of them the obligation to pay it is only implied. Where it is not given by express contract, and the obligation to pay it is not implied by the courts, there is a large class of cases in which it is given as damages for the non-payment of money when due. There are, therefore (using the terms of the civil law), three modes in which interest may become due: by *obligation ex contractu*, by *obligation quasi ex contractu*, and by *obligation ex delicto*; that is to say, by contract, by implied contract, and by tort. It is with reason contended that the prohibition of the National Constitution does not apply to the two latter classes of contract, but only to the first. There is reason for prohibiting the States from impairing express contracts entered into in solemn form; while great mischief and abuse may result from wholly annihilating their power over the multitudinous class of implied contracts, which are inferences of the courts often contravening the intention of parties. The clause of that instrument containing the prohibition is in these words: "No State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Each of the other phrases in the context is used in its strictly technical sense. "Bill of attainder" has a well-defined judicial meaning, and the courts will not give it a constructive meaning other than or beyond its technical one. So the phrase *ex post facto* law is held to embrace only laws relating to crimes, and will not be allowed by the courts to embrace retrospective laws affecting civil rights. Likewise, it is contended that the phrase *obligation of contracts* should be strictly construed; that is to say, should be treated technically, and should not be interpreted to embrace other contracts than those known in the classification of the civil law as *obligationes ex contractu*, or express contracts. It is a historical fact that the prohibition was inserted in the Constitution on the motion of an eminent civil lawyer, educated in Scotland, Mr. Wilson, afterwards justice of the Supreme Court of the United States. There can be no doubt that the mover of the provision intended it to have only its

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technical signification ; and it is with reason contended that the phrase should be construed strictly, and not be latitudinously extended to apply to *obligationes quasi ex contractu* (implied contracts), or to *obligationes ex delicto*, the obligation to pay damages. What possible reason can exist for depriving the States of power over the latter classes of obligations ?

Neither of the notes which are the subject of the petition in this case gives interest in terms. It is due upon each of them only by implication. It is due for the *forbearance* of money. It is due by *obligation quasi ex contractu*. It may with reason be contended, therefore, that this is not one of the class of contracts falling within that prohibition of the National Constitution which would render the act of the Virginia Assembly void in regard to express contracts.

But however this phrase of the National Constitution may be interpreted touching the special subject of interest in other States, and in suits between citizens of other States, the question in Virginia stands upon a special basis, to some extent peculiar to this Commonwealth. Here the state of the law relating to interest is as follows : By common law, the taking of interest was usury, and a punishable offence. This being the normal condition of the law for a long time, a statute finally was passed in England giving the creditor permission to charge a certain limited percentage of interest, the taking of a greater percentage being still left as a punishable offence ; and in Virginia this statutory permission has been continued from time to time down to the present day, always coupled with a legislative provision that the allowance of even the rate of interest permitted to be taken by law should be within the discretion of juries.

Therefore this legislative provision has entered into and become a part of every contract of interest, express or implied, which has been made, during its existence upon the statute-book. Being a part of the contract in every case, the clause of the National Constitution prohibiting the passage of laws impairing the obligation of contracts does not apply to this law of Virginia.

The condition of the law in Virginia, on this subject, is precisely the same as it is on the subject of corporate charters.

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When the legislature grants a charter, but for a general law on the subject it would have no power to alter or amend the charter until the term for which it had been granted had expired. This is so, because of the decision of the Supreme Court in the Dartmouth College case, which declared charters to be contracts, and that laws altering charters had the effect of impairing the obligation of contracts, and therefore contravened the clause of the National Constitution forbidding such laws.

The consequence has been, that most or all of the States—Virginia among them—have expressly reserved the right to alter or amend every charter that is granted. In Virginia this reservation is not repeated in each act of charter, but is a standing provision in the form of a general law of corporation, so that now, by virtue of that general law, the legislature of the State alters and amends every charter at its pleasure, and these amendatory laws do not contravene the clause of the National Constitution under consideration.

Precisely the same is the case with reference to the disallowance of interest. From a period long anterior to the adoption of the National Constitution, has the General Assembly of this State reserved to itself the power of intrusting the allowance of interest to the discretion of juries. This express reservation of power has entered into every contract between her citizens that has been made within a hundred years, and the act of Assembly of 1872-3, ch. 353, p. 344, Code of 1873, sec. 14, ch. 173, p. 1120, directing the courts and juries to exercise that discretion, does not, in my opinion, in any degree, impair the obligation of contracts within the inhibition of the National Constitution.

As to the equities of the case, alluded to by both counsel in the conclusion of their briefs, I think there are, in general, very strong equities against the allowance of war interest. In the great majority of cases in which the interest for that period is unpaid, the creditors refused to accept it, at the time it fell due, in the currency then in circulation. They preferred to take the chances of receiving gold or its equivalent, after the war should be over, and of the enactment of such legislation as the State has actually resorted to. The permanent and fixed legislative policy of the State had been and was, to reserve to her juries the

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discretion of allowing or disallowing all interest; and these creditors certainly ought to have contemplated the very probable contingency of the legislature's directing the exercise of this discretion as to interest falling due during the war, when all the resources of the State and her citizens were devoted to the prosecution of their side of the contest. They had knowledge of the legislative policy alluded to, and had notice of the probability that war interest would be disallowed as described. If, with such notice, they chose to refuse interest, as it became due, or to forbear the collection of it, they cannot now complain of the harshness of the law by which it is disallowed.

The assignee in bankruptcy has made his claim to war interest in this case by bill in chancery, making the maker of the notes, the trustee in the deeds of trust securing their payment, and the indorsers of the notes on which the interest is claimed, parties defendant. A decree will be given in accordance with the prayer of the bill, except that the defendant, Wilson, will be required to pay the amount which shall be found due upon the notes, without computing interest for the period between the 17th of April, 1861, and the 10th of April, 1865.

United States District Court, Eastern District of Virginia.

JOHN S. FOWLER, ASSIGNEE, v. JOHN J. DILLON *et al.**

The United States District Court, as a court of equity, having cognizance of all cases and controversies between a bankrupt and his creditors, has the same power to restrain creditors in judgments at law against a bankrupt that a State court of equity would have over such creditors if the debtor were not a bankrupt.

The power to reduce the amount of judgments at law rendered on confederate contracts, to the equivalent in legal money, is an equitable power belonging to State courts of equity, and may be exercised in cases where bankrupts are parties defendant, by the United States District Courts, sitting as courts of equity.

* This case is also reported in 12 N. B. R. R., 308.

Statement of the case.

War interest being inequitable under the laws of Virginia, the United States District Court, as a court of equity, may require the judgment creditors of a bankrupt to abate such interest when embraced in judgments rendered by default, before 1878.

At the June term of the County Court of Loudon, 1871, judgments by default were obtained, one of them by the administrators of Anne Dillon, deceased, against William N. Hough, for two thousand six hundred and fifty dollars, with interest and costs; another of them against W. N. Hough and two other defendants jointly in favor of John J. Dillon, for one thousand nine hundred dollars, with interest and costs; and another by John J. Dillon against W. N. Hough and two other defendants, for four hundred and fifty dollars, with interest and costs.

At the October term, 1868, of the Circuit Court of Loudon, a judgment was obtained by the representative of Joshua Reed, deceased, against William N. Hough, for eighty-three dollars and forty-four cents, with interest and costs; and at the June term, 1871, of the County Court of Loudon, an office judgment was obtained by the representative of Joshua Reed, deceased, against William N. Hough, for the sum of two thousand dollars, with interest and costs, subject to large credits for payments made November 28th, 1870, and December 21st, 1870. Upon these latter judgments execution went out, and were returned, or levied, so as to bind the personal property of William N. Hough; and the judgments were docketed as liens upon his real estate. Except the one specified, no part of these judgments has been paid.

On the 15th day of March, 1873, the said William N. Hough was adjudicated a bankrupt in this court.

All the debts on which the judgments named were taken were confederate debts, made during the civil war, and the consideration of them confederate money or bank bills of banks of the confederacy. The amounts of the debts for which the judgments were taken were never scaled down to their value in genuine money; but the judgments were taken for their full face value. All the judgments, except probably that of October, 1868, were by default, and embraced interest for the period of the civil war. The act of Assembly relieving against war interest was not passed until April 2d, 1873.

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HUGHES, J.—The question is, Can this court require the creditors in these judgments to scale these debts? The courts of Virginia, as courts of equity, have frequently interfered when their powers were invoked to rectify the amounts for which judgments at law have been taken expressed in confederate money. And besides this prescriptive equitable power to correct mistakes in judgments, and prevent the enforcing of unconscionable claims, exercised by these courts as courts of chancery, the legislature has conferred statutory powers upon the courts in this class of cases. Recognizing the equity of thus scaling debts contracted in an inflated and depreciated currency, and in order to secure uniformity of procedure, the General Assembly of Virginia, in acts of Assembly for 1872–73, p. 219, Code of 1873, p. 982, passed laws allowing proof of the real consideration of confederate contracts to be made; directing confederate debts to be scaled by a fixed schedule of values; giving remedies in the courts against judgments for confederate debts obtained after the war by default, and obtained during the war for confederate amounts; and giving the courts power, upon evidence, “to scale the said debts and judgments” as of such date as may to the court seem right “in the particular case.”

The courts of the State, as courts of chancery, have not considered that in exercising this power to adjust the amounts due upon money contracts according to principles of equity and good conscience, they were violating or impairing contracts; but have thought, rather, that they were executing them according to the real intention of parties. And the General Assembly of Virginia has not, in endeavoring to fix a schedule for the graduation of contracts, thought for a moment that it was abrogating or impairing contracts; but rather that it was providing a legal basis for the private settlement of confederate contracts, and thus preventing the necessity of carrying every such contract into the courts.

I do not, therefore, concur in the proposition of counsel for the judgment creditors of Hough, that judgments by default for the full amount of money called for by confederate contracts are vested rights, beyond the reach of an act of Assembly or a court of equity. The power of the Court of Chancery over judgments

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at law has not been disputed since the reign of James I, and extends to the proceeding at law in every stage. (Story, Eq. Jur., section 886; Kerr on Injunctions, pp. 21-27; and Spence's Eq. Jur., p. 674.) In repeated cases in Virginia have the State courts, as courts of equity, interfered to rectify the amounts recovered by judgment on confederate contracts, by scaling them to their equitable value. And the General Assembly of Virginia has, in ch. 43, section 10, of the code, recognized this power in courts of equity, and forbidden its abridgment, by providing that nothing in the act making provision for the correction of judgments and adjustment of accounts due upon confederate contracts "shall be construed to take away or impair the ordinary jurisdiction of courts of equity." It has, moreover, given a remedy by summary motion in courts of law to any defendant aggrieved by judgment on default for confederate money, rendered since March 3d, 1866. Certainly, if such judgments may be opened by summary motion on notice to the creditor, there can be no successful denial of the power of a court of equity, clothed with a prescriptive jurisdiction over contracts and judgments, which has existed for nearly three centuries, to correct judgments of the class under consideration, by enjoining creditors from enforcing them.

If, therefore, this were a court of the State sitting in chancery, upon a general creditors' bill, brought for the marshalling and distribution of the effects of an insolvent debtor, there would be no doubt not only of its power to look into the consideration of the contracts on which the judgments against Hough were obtained, for the purpose of rectifying them, but it would be its duty to do so, and to reduce the amounts to their proper value for the benefit of the creditors of the estate.

The proceeding in bankruptcy is nothing more nor less in its nature and objects than a general creditors' bill; and the bankruptcy court is in effect a court of chancery, established for the specific purpose of administering a bankrupt's estate under a proceeding which is in effect a general creditors' bill. As such, it has precisely the same powers in equity over judgments of State courts affecting the bankrupt's estate, which a State court of equity would have under a general creditors' bill, if the debtor

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were not a bankrupt. It is true that the Bankrupt Act forbids the summary proceedings in bankruptcy to be used where third persons, other than the bankrupt and his creditors, are to be affected, and requires, in such cases, that the proceedings taken in the District Court shall be plenary proceedings, in the form of a suit in equity. This requirement has been enforced in the present case; and the question is, Has this court power to look into the consideration on which the debts of Hough, the bankrupt, were founded, which are the subject of the judgments that have been described?

As a court of equity, clothed with power and jurisdiction over "all cases and controversies between the bankrupt and his creditors, for the collection of assets, and the ascertainment and liquidation of liens thereon, and for the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and to effect a due distribution of the assets among all the creditors," this court has not only the same power as a State court of equity to restrain the enforcement of a judgment at law recovered against a bankrupt for an improper amount, but it is its peculiar duty and province to do so. As the State courts of equity do not hesitate, when invoked, to restrain the enforcement of judgments for the full amount of confederate contracts, it cannot be deemed an unusual or unauthorized stretch of power in a bankruptcy court sitting in chancery to do the same thing.

I have already stated the reasons which induce me to reject the idea that judgments of the class under consideration confer vested rights, and cannot be disturbed, except by violating the constitutional inhibition against impairing the obligation of contracts. Congress is not subject to this inhibition, and the courts of the United States may proceed in the discharge of the functions with which they are clothed by Congress without violating it. But in this case no such objection can hold good. To correct a judgment at law so as to conform the amount recovered by it to the real intention of the parties, and render it consistent with justice and equity, is not to impair the obligation of contracts, but the reverse.

There is but one other question left for consideration; and that is whether, after judgment by default, the judgment creditor

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may be made to abate the interest which accrued on his debt during the period of the late civil war. I think the principle is settled in Virginia, that interest during a period of war is not recoverable except by the express allowance of the court or a jury. Judge Joynes, President of the District Court of Appeals at Petersburg, said in the case of *Tucker v. Watson et als.*, 6 A. L. R., 220, upon a review of the authorities on the subject: "After such an array of judicial opinion and authority, including at least one express decision of the Court of Appeals of Virginia, we do not feel disposed, if we were at liberty, to examine the question as an original one, and do not think it necessary to explain the various grounds on which the decisions referred to have been placed. . . . We are of opinion that interest during the war is not recoverable."

The laws of Virginia have, from the earliest history of the commonwealth, left the question of interest, in every contract, to the discretion of the jury. The language of the Code of 1849, p. 673, is: "*The jury, in any action on contract, may allow interest on the principal sum due, or any part thereof, and fix the period at which such interest shall commence.*" The language is repeated in the Code of 1873, p. 1120, Section 14; as taken from the act of Assembly of 1872-3, chapter 353, passed April 2d, 1873. This act gives the same power over interest as to all future contracts. The same act, in another clause, gives power to the court or jury to allow or disallow interest arising during the period of the late civil war. The same act, in another clause, provides that on any "judgment or decree *heretofore rendered, which has not been paid*, the defendant may, on motion, after ten days' notice to the plaintiff, cause the same to be reviewed by the court in which it was rendered, and if it shall appear from the record that the judgment embraces [war] interest, it shall be lawful for the court to cause said judgment to be abated to the extent of the interest so embraced." These provisions of statute law, all taken together, conclusively show that in Virginia interest is deemed to be a subject not of natural, but of statutory right, to be allowed to a creditor only when and to the amount prescribed by statute or by the tribunal intrusted with power over the subject. And the last clause above quoted is virtually an assertion

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by the legislature, that its power is so complete that judgments for interest shall not confer a vested right, which shall transcend the power of the legislature or the courts and juries to reach it.

The settled law of Virginia being not only generally that interest is subject to the discretion of a jury, but, specially, that interest during the period of war shall not be taken, except by allowance of court or jury after contest, it follows that if a judgment has gone by default for interest during the war at any time before the act of 1873, it is within the province of a court of equity to require the creditor in such a judgment to abate the interest. The judgment does not confer a vested right, and covers an inequitable claim, which it is against the policy of the law of Virginia to allow.

I return, therefore, to the question whether this court, as a court of equity, with jurisdiction and power over the creditors in the judgments under consideration, may compel those creditors to abate the war interest on their debts. If they had recovered those judgments after contest, and after the passage of the act of Assembly of 1872-3, chap. 353, then the subject may have been *res adjudicata*, and the creditors might not have been interfered with. But, as laid down by Judge Marshall, in 7 Cranch, 336: "Any fact which clearly proves it against conscience to execute a judgment, and of which the party enjoined could not have availed himself at the trial at law . . . will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such adverse judgment."

Not doubting, therefore, the power of this court over the creditors in these judgments, and seeing that the laws of the State declare that the collection of war interest is inequitable, and that the law authorizing the disallowance had not been passed at the time that these judgments were rendered, I am of opinion that this court ought to interfere to require an abatement of the war interest on these judgments; and that it ought not to put the bankrupt or the assignee to the needless task of applying to the courts of law which rendered these judgments for an abatement of this war interest.

NOTE.—The decree in this cause was affirmed on appeal by the Circuit Court.

Statement of the case.

*District Court of the United States, Eastern District of Virginia,
at Richmond.*

HOWARD AND WENDLINGER, ASSIGNEES, v. GEORGE S. AND
JOHN D. PRINCE.*

The possession by vendor, after bill of sale, of the fixtures used in the manufacture of tobacco, is not *per se* fraudulent, under the rule in Twyne's case and under the 1st section of chapter 114, of the Virginia Code.

In such a case, the principle, *creant* creditor, is to be applied.

In such a case, the Federal court follows the State law and the precedents of the State courts.

IN equity.

This case was submitted on written arguments of counsel and written testimony, by Ould & Carrington and Keen & Davis for complainants, and Jno. A. Lynham for defendants.

In the beginning of February, 1873, George S. Prince, a manufacturer of tobacco in Richmond, Virginia, applied to his father, John D. Prince, of Brooklyn, New York, for \$2000, offering to mortgage the fixtures in his factory to secure the amount, or to make an absolute bill of sale of the fixtures. John D. Prince replied, that he could not then say whether he could spare the money, that his son might, however, draw for \$500, and that if he should find he could let George have the rest of the sum, he would insist upon an absolute sale to him of the fixtures. A draft for \$500 was drawn by George Prince, on the 1st of March, and paid by John D. Prince. Original letters relating to the transaction, reaching to July 19th, 1873, are filed in the cause.

In June afterwards, upon renewed solicitations by George, the father finally consented to spare the remaining \$1500, and required a bill of sale of the fixtures to be sent him. Accordingly, on the 14th of June, 1873, George S. Prince drew for \$500 as part of the \$1500 remaining due, which draft was paid by John

* This case is also reported in 11 N. B. R. R., 322.

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D. Prince. But on the 19th of July following, on George's telegraphing that he had drawn a third draft for \$500, John D. Prince wrote, complaining that George had neglected to send him the promised bill of sale with inventory of fixtures, saying that he would accept and pay this draft, but declaring that George need not draw again without performing his promise, for he should certainly allow the draft to be protested. George Prince thereupon forwarded a bill of sale of the fixtures, the original of which is attached to the depositions in the case, taken by Commissioner Winslow, of New York. The bill of sale is dated Richmond, June 14th, 1873. This instrument was copied at the time it was written into the letter-book kept by George Prince in his factory, by M. M. Burton, his manager, was known and talked of in the factory, and no concealment of it attempted. It does not appear to have been recorded in the office of the Chancery Court of the city of Richmond, where registered instruments are by law recorded. There is no actual fraud proved in the transaction—none attempted to be proved as against John D. Prince, of Brooklyn, who would seem to be a man of wealth and high character, and a liberal and kind father. Probably the bill of sale was not actually made until about the 19th of July, the date of the third draft, and of Mr. John D. Prince's letter of complaint; probably it was then made out and antedated as of the 14th of June, in order to conform to the date of the second draft, that being the date when George Prince seemed to consider that the contract between himself and father had been concluded. It is contended that if this bill of sale was good at all, the fact that it was dated on the 14th of June, but delivered on the 19th of July, invalidates it without proof that a fraudulent purpose was subserved by such antedating. It is proved by the defence (and is not denied by the complainants) that the whole \$2000 obtained from John D. Prince, was used by George in payment of dues to creditors in the line of his business.

It is not charged or proved that George Prince was insolvent on the 19th of July, 1873, or that the bill of sale was made in contemplation of insolvency or bankruptcy, or that John D. Prince knew, or had reasonable cause to believe at the time, that

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his son was insolvent or contemplated bankruptcy. Therefore, this bill of sale does not fall within the second clause of the 35th section of the General Bankrupt Act, and was just as valid if made on the 19th of July, 1873, as if made on the 14th of June before. If made in good faith, the 11th section of the amendatory act of Congress of 22d of June, 1874, would take the transaction from the operation of that clause.

The panic of 1873 came on in September following the transaction which has been described. George Prince became a victim of it on the 17th of December in that year, when he filed his petition in bankruptcy.

His assignees in bankruptcy now file their bill on the chancery side of this court against George S. Prince and John D. Prince, and pray that the bill of sale of the 14th of June, 1873, may be set aside as fraudulent, and that the tobacco fixtures conveyed by it may be sold as part of the assets in bankruptcy, in the case of George S. Prince, bankrupt, pending on the bankruptcy side of this court.

HUGHES, J.—The case presents itself as one of a sale of personalty, where the vendor remains in possession of the goods sold. The old common law rule was, that in such a case the continued possession of the goods by the vendor was, *per se*, fraudulent, and rendered the sale void. It was decided in *Twyne's* case, which was rendered upon the statute of 13th Elizabeth, ch. 5, declaratory of the common law, that though the sale in that case were upon valid consideration, yet the continued possession of the vendor invalidated the sale; the secrecy and non-delivery which was proved raising a presumption that the whole transaction was collusive, creating a trust for the benefit of the vendor. In *Edwards v. Harben*, 2 Term, 587, it was held that such possession was not merely *evidence* of fraud, but was itself, in point of law, fraudulent. These cases controlled the decisions of the English courts for a long period of time, and produced for many years, like decisions by the courts of many of the States in this country, Virginia included, and by the courts of the United States.

But in England, the doctrine of fraud, *per se*, has been dis-

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carded, and the milder rule has for some time obtained, that continued possession after sale of personalty by the vendor creates only a presumption of fraud, and that the fact of fraud is not, in suits at law, to be determined by the court, but must be left to the jury; and it is further held in England, that if the personal chattels savor of the realty, as, for instance, engines, utensils, and machinery belonging to a manufacturing establishment, no presumption of fraud will arise from the want of delivery. 2 Kent, 516, and cases there cited.

If the transaction under consideration between George S. Prince and John D. Prince is fraudulent, it is so under the law of Virginia, as construed by the courts of Virginia; that law being now section first of chapter 114 of the code of 1873.

Counsel for complainants contend that this court must decide this case by the precedents which they cite from the Supreme Court, and other courts of the United States. In one sense, that should and must be done. But in no case in which a court of the United States has had to pass upon the doctrine to which I have alluded (other than cases in which the personalty concerned was a ship at sea, or other thing exclusively within the admiralty jurisdiction), has it decided against the law and ruling of the courts of the State in which the property was assigned. The leading federal decisions (especially the noted case of *Hamilton v. Russell*, 1 Cranch, 309) were rendered upon cases arising in the District Court of Columbia, where the Federal courts were at liberty to lay down the law irrespective of the laws of the States.

In the case now before me, I should go counter to the uniform practice of the courts of the United States if I should be governed by any other law in my decision than the statute of Virginia, just referred to, and should construe it by any other precedents than those of our own Court of Appeals.

I have said that the rule of *Edwards v. Harben*, 2 Term, 587, did substantially obtain for a long time in Virginia; see 2 Hen. & M., 289, 302; 2 Mun., 341; 3 Mun., 1, 7; 5 Mun., 28; Gilmer, 15; 5 Ran., 211, 599; and 2 Rob., 280. But at last our Court of Appeals found it necessary to recede from a rule which common experience had taught to be unjust and untenable. The cases of honest assignments where the vendor retained posses-

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sion, were too numerous and too frequent to allow of a further adherence to the old arbitrary rule of fraud *per se*. Accordingly in the case of *Davis v. Turner*, 4 Grat., 423, cited with distinguished consideration throughout the United States and in England, most of the judges who had held to the rule, themselves receded from it, and the court adopted the conclusion, expressed as follows by President Cabell: "It seems now conceded on all hands that the continued possession of the vendor, after an absolute sale, is open to explanation in some form or shape, and we are not so restrained from authority as to prevent our allowing an explanation that shows such possession and the whole transaction to have been fair and honest, and especially where such possession has been held under a bailment for a valuable consideration, in good faith made from the vendee to the vendor. . . . It would be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject, in the true spirit of the statute, and it is better to confine the interposition of the court to guiding, instead of driving, them by instructions, and to the power of granting new trials in case of plain deviation." I need not repeat that this case of *Davis v. Turner* has become a leading case on the subject on this continent. As declaring the law of Virginia, it is binding upon this court.

The question before us now, is whether the transaction that has been described, which took place between George and John D. Prince, in June and July, 1873, was fraudulent under section first, chapter 114, relating to fraudulent acts, of the code of Virginia.

A full and free power to dispose of chattels is an essential and inherent incident of ownership; and the vendee has the same right to leave them in the possession of the vendor that he would have to take them into his own custody, or place them in the possession of a third person; unless such act necessarily and inevitably tends to deceive and defraud creditors, 4 Hill, 271. The frequent necessity of intrusting personal estate to others than the actual owner, forbids an arbitrary enforcement of the rule that possession shall always be deemed conclusive evidence of title. 2 N. H., 13.

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It being a case in chancery, I am to exercise the functions of a jury; and in doing so, I am required to *presume* that the transaction was fraudulent, because of the fact that George S. Prince retained possession of the fixtures assigned by the bill of sale; but I am also allowed to take the other facts presented in the evidence into consideration, as explaining away or not, this legal presumption.

If the bill of sale under consideration had been made for the purpose of securing to John D. Prince the payment of a debt which George S. Prince owed him before the time of the assignment, the case would have been the invidious one of preferring one creditor over others; and the *presumption* arising from continued possession would have been exceedingly strong, if not insurmountable; for it would have been a case of preference and partiality. But the fact here was, that the father advanced money to the son for the purpose of being used, and which was used, for the benefit of other creditors. The money paid by the father was faithfully appropriated to the claims of other creditors; and the assignment was made, not to the *prejudice* of other creditors, but to their advantage. This is a circumstance in the case which I find myself unable to consent to disregard.

Again, if the property assigned had been public or corporate bonds, or bills payable, or tobacco, or any movable thing which could have been physically delivered with convenience, then if it had not been delivered, but the use and possession of it retained by George S. Prince, the presumption of fraud would have been very strong. But the property assigned was not of this movable and transferable sort. It was fixtures, a personalty which savored of realty; a sort of property which John D. Prince would have had no use for in Brooklyn, N. Y.; a sort of property which as often as not in Richmond, does *not* belong to the manufacturer of tobacco, but belongs to his landlord or other owners; a sort of property the mere possession and use of which in the business of tobacco manufacturing, are not in fact presumptive of the manufacturer's ownership. It is a sort of property the real ownership of which is not, in fact, and as of course, presumed from the mere use of it by the manufacturer, nor made the basis of credit, any more than is the ownership of the building. It is

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a sort of property the ownership of which would be especially inquired of by a prudent creditor before giving credit. The Virginia Court of Appeals having adopted the present English rule on the legal question under discussion, I will presume that it has adopted also the English precedents. See Ry. & M., 312; 8 Taunt., 838; 5 Esp., 22; 3 B. & C., 368; and 3 B. & Ad., 498.

The case under consideration is emphatically one in which the rule *caveat* creditor applies. The creditor of a tobacco manufacturer in Richmond does not in fact presume that either a factory building or the fixtures in it is the property of the manufacturer. He does look and he should look to the ownership of each before giving credit upon either. In the case of fixtures, if there is no actual fraud by misrepresentation and false pretence, fraud ought not even to be *presumed* from the mere fact that a vendor has use and possession of such ponderous personalty as tobacco fixtures, which he has sold.

The evidence of Mr. Burton in this case is, that in nine-tenths of the tobacco factories of Richmond, the fixtures are in other ownership than that of the manufacturers, or are under mortgage.

The presumption of fraud created by law in this case, is therefore, I conceive, negated by the nature of this property as well as by the proved facts of the transaction. The fixtures were bought by contract; they were paid for in money; the purchase-money was used *bona fide* by the vendor in payment of his creditors; the continued possession was of property that would have been useless if removed merely to effect a change of possession; it was used after the sale, for the benefit of the business and of the creditors; and the property was of such a character as not by the custom of Richmond to create the impression of ownership in the person using it, or to give a credit to that person.

I am, therefore, of the opinion that the bill of sale in this case ought not to be set aside; and that the bill of the complainants ought to be dismissed.

I will make an order to that effect, and give leave to the complainants within ten days of its date to appeal from the order upon filing a bond for costs, and a copy of this record and this decision with the clerk of the Circuit Court.

NOTE.—There was no appeal.

United States Circuit Court, District of Virginia, at Richmond,
1796.

SHEDDEN v. CUSTIS.*

A plaintiff in a Federal court must state himself to be the subject or citizen of a foreign State, in order to entitle the court to jurisdiction. And if he omits it, the defendant may take advantage of the omission by motion in arrest of judgment

For, the General and State governments should be kept separate; and each left to do the business properly belonging to it.

THE plaintiff did not state himself in his declaration to be the subject or citizen of a foreign State; and the question was, if this should be done, in order to show that the court had jurisdiction.

JAY, C. J.—If the court has not jurisdiction, it is on account of the disability of the person, which might be pleaded in abatement; and if it could be pleaded in abatement, then can the exception be taken advantage of, by motion in arrest of judgment, after verdict.

Wickham, for the defendant.

The exception appears upon the face of the declaration. For the charge of jurisdiction in the declaration only states that the bond itself was made within the jurisdiction, but says nothing as to the person of the plaintiff. Now, jurisdiction in this court respects the person, and not the place; for the court has jurisdiction as well over contracts made without, as those made within the limits of the State. The difference is, between courts of general, and those of limited jurisdiction. If the cause depended before the Court of King's Bench in England, or the general court here, and there had been any disability, it should have been pleaded; because their jurisdiction is general. But the jurisdiction of this court is limited, as to persons; and, therefore, should be shown, as well as that of a court whose jurisdiction is

* This report is taken from 6 Call's Virginia Reports, p. 241.

Argument for plaintiff.

limited as to locality and extent. The common law authorities all show that jurisdiction should be averred; and though they may seem to differ, yet the whole difference in any of them is only what amounts to a sufficient averment, on which the authorities do not agree. Now, the only difference between those cases and that at bar is that those were inferior courts, and this a superior court; and therefore it may be argued that the cases in the former turned upon the inferiority of the court; but that argument is not satisfactory. The true reason is, not that they were inferior, but that they were limited courts. So this is. Therefore, the plaintiff must show that the court has a right to discuss his claims, and not merely that he has a right to the thing he claims.

Campbell, contra.

A motion to arrest a judgment must be grounded on error apparent on the record; and the question is of this case here. Something should manifestly appear to be erroneous; not whether, possibly so, or not. The English authorities do not prove that disability may be urged after verdict. The question, in all of them, was concerning the limits of the jurisdiction of the court where the actions were brought. For, being inferior courts, the superior courts at Westminster confined them, both because derogatory to the common law and for sake of the venue. This, therefore, is a novel objection, and must stand on its own reasons. Some persons may sue here, others cannot. Therefore, the defendant must point out the disability; for the court will not inquire into circumstances, unless he shows it. Parties are only the instruments of jurisdiction; for the jurisdiction of the court is independent of parties. There must, indeed, be parties before the court; but jurisdiction consists in authority to decide rights. If the defendant does not show a want of jurisdiction, it shall be intended. Carth., 33, 34. The doctrine is, that by pleading you admit jurisdiction. It may be argued that consent does not give jurisdiction, but that is only where want of it appears of record.

If, indeed, the declaration had stated that the plaintiff and defendant were both citizens of this State, the defendant's admission would not have given jurisdiction; but the party may dis-

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pense with facts if he will. Comberbach, 254. Therefore, as the case now stands, it is altogether a question as to the subject-matter of complaint, and if the plea does not state facts to oust jurisdiction, the court will intend it as admitted. The court cannot judicially notice districts of country, or the kind of persons who sue, unless it be expressly submitted to them by the pleadings. But after issue joined on the merits, they will not receive proof of residence or other disability, but of the subject-matter in dispute only. For the plea answers the allegations with respect to the debt, and not of the person. If inconveniences should be alleged as that any citizen may sue here, the answer is, that the defendant may avail himself of the incapacity of the plaintiff to sue, by pleading, and if he does not, he must abide by it.

Wickham was about to reply, but was stopped by the court.

IREDELL, J.—The jurisdiction of the court is limited to particular persons; and, therefore, must be averred. For the difference has been rightly taken by the defendant's counsel, between courts of limited and those of general jurisdiction. In the latter, exceptions to the jurisdiction must be pleaded; but in the former the defendant is not bound to plead it, for the plaintiff must entitle himself to sue there. If the declaration had alleged that the plaintiff was a foreigner, then the defendant must have pleaded the disability, as he would have admitted his capacity to sue. Ability to sue here is a fact which rests more in the knowledge of the plaintiff than of the defendant; and, therefore, the former should show himself capable of suing here. It is not the same with regard to the place of contract, for that the defendant knows as well as the plaintiff; and, therefore, if there be any exceptions on that ground, it being a thing in the knowledge of the defendant, he should plead it for the same reason that the plaintiff must aver his capacity in the other case. It is important that it should appear upon the record that the court had jurisdiction and has only decided on cases within its cognizance.

JAY, C. J.—I at first thought it questionable on the ground of a difference between jurisdiction over the subject-matter and

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over persons. But on reflection, I do not think the distinction is important. The English practice has been rightly stated by the defendant's counsel, and those rules are more necessary to be observed here than there, on account of a difference of the General and State governments, which should be kept separate, and each left to do the business properly belonging to it. Therefore, this court should not exceed its limits, and try causes not within its jurisdiction. Consequently, the jurisdiction ought to appear, but it does not in this case; and, therefore, I think the judgment should be arrested.

United States Circuit Court, District of North Carolina, at Raleigh, 1792.

ARCHIBALD HAMILTON & Co. v. JOHN EATON.*

When, during the war of Independence (1775 to 1783), a debt due from a citizen of North Carolina to a British subject had been confiscated to the use of that State by law of its legislature and been paid to its commissioners by the debtor,

Held, that under that clause of the treaty of peace of 1783 by which it had been stipulated that citizens of either side should meet with no lawful impediment in the recovery of *bona fide* debts contracted before the date of the treaty, judgment must be rendered for the plaintiff in a suit brought for such debt.

THIS was an action of debt upon a penal bill bearing date the 11th day of August, 1776, for the penal sum of eight hundred pounds, proclamation money, to be discharged by the payment of four hundred pounds, like money, payable on the first day of August, 1778, with lawful interest from that date. The plaintiffs, Archibald and John Hamilton, trading under the firm of Archibald Hamilton & Co., were subjects of Great Britain, but

* This report of the case is much condensed from a very elaborate report of the pleadings, argument of counsel, and opinions of judge, in pp. 1-77, second part, Francois Xavier Martin's Notes of North Carolina Cases, 1797.

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were residents of North Carolina before and at the time of the Declaration of Independence, July 4th, 1776. The defendant, John Eaton, was a citizen of the United States, and of North Carolina, and was a citizen of North Carolina before the said Declaration of Independence.

There were several pleas to this action. It is useless, as the case turned on that, to state any other than the first and principal one of those pleas, which was, that a law of the State had required that all persons, subjects of the State, living therein, who had traded to Great Britain or Ireland, should take an oath of allegiance or depart out of the State; that the plaintiffs had departed out of the State, leaving their debt due them; that another law of the State had appointed commissioners to sequester debts of citizens due to subjects of Great Britain to the use of the State, which commissioners had duly sequestered this debt, which the defendant had paid to them for the use of the State; and that, therefore, by the laws of war and the law of nations, the defendant did not owe this debt.

To this plea it was replied, that by the treaty of peace, which was entered into between Great Britain and the United States, which terminated the war of the Revolution in 1783, it had been stipulated by the two powers, that "creditors on either side should meet with no lawful impediment to the recovery of *bona fide* debts heretofore contracted."

To this replication there was a demurrer, and there was a joinder in the demurrer.

The case was elaborately argued by Mr. Davie for the plaintiffs, and by Mr. Baker for the defendant. The following were the opinions of the district judge and the Chief Justice of the United States.

SITGREAVES, J.—This is an action of debt brought by the plaintiffs, to recover of the defendant on an obligation made in the year 1776. The defendant has pleaded four several pleas in bar, which are now for the decision of the court by demurrer.

I shall consider of the case as it appears by the first plea, which places the defendant on the most advantageous ground, as

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a decision on that will probably govern all the cases arising out of the subsequent pleas.

The case as it appears by the first plea is as follows: The plaintiffs were merchants, residents of North Carolina, before and at the time of the Declaration of Independence. By an act of the legislature of North Carolina, passed in April, 1777, it was among other things enacted "that all persons being subjects of this State, and now living therein, or who shall hereafter come to live therein, who have traded immediately to Great Britain or Ireland, within ten years last past, in their own right, or acted as factors, storekeepers, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, shall take an oath of abjuration and allegiance, or depart out of the State." By the same act, such persons were permitted to sell their estates, to export the amount thereof in produce, and to appoint attorneys to sell and dispose of their estates for their use and benefit. The plaintiffs falling within the description of persons contemplated by this act, and refusing to take the oath, departed the State, the debt which is the subject of the present suit then existing. By subsequent acts of the legislature, all the estates, rights, properties, and debts of certain persons, among which the plaintiffs are specially named, are declared to be confiscated, and the debts due to such persons are directed to be paid to certain commissioners, to be appointed by the county courts for that purpose, by all persons within the State owing the same, under pain of imprisonment, which payment it is declared shall forever indemnify and acquit the persons paying the same, their heirs, etc., against any future claim for the money mentioned in the receipts or discharges of such commissioners.

In obedience to those acts, the defendant paid the debt in question to the commissioners authorized to receive it, and relies on that payment as legal, and a full and sufficient discharge; the plaintiffs admitting the fact of payment as legal on the construction of the treaty of peace, the Constitution of the United States declaring that treaty to be part of the law of the land. The counsel for the plaintiffs in support of this claim has, in the course of his argument, presented to the view a doubt whe-

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ther the debt in the present question has been confiscated in a strictly legal sense, by any of the acts called confiscation acts, and has urged the doubt strenuously, and with much force of argument, contemplating them as a body of penal law, and of course subject to the legal rules of construction in such cases. The observations on that point would merit much attention, but I deem it not absolutely necessary to investigate that question in forming an opinion of the present case, and shall confine my observations solely to the law and the facts, as they arise out of the pleadings in the first plea of the defendant, which admits alone of this question, viz. :

Are the plaintiffs barred of recovery ?

It would appear quite unnecessary to inquire whether Congress, under whose authority the treaty was negotiated, was vested by the State with a power competent to enter into such a contract, had not part of the argument of the defendant's counsel seemed to require it. No one will doubt if they had the power, the treaty consequently became obligatory on the people of the United States when made and duly ratified.

Whatever agreement the States may have entered into at the Declaration of Independence, and to what purposes and extent that agreement may or may not have bound them, as a confederated body, it is clear that at a subsequent period, and previous to the negotiation of this treaty, they by their delegates in Congress formed and entered into a solemn compact, by which they plight and engage the faith of their constituents to abide by the determination of the United States in Congress assembled on all questions which by the confederation are submitted to them; and that the articles thereof shall be invariably observed by the States. Among many other portions of sovereignty which the States thought proper to deposit in that confederated head was the sole and exclusive right and power of determining on peace and war (except in certain cases specially enumerated), of sending and receiving ambassadors, entering into treaties and alliances. No words can be more comprehensible or express relative to the point in question; nor is there offered to my mind the least room of doubt. Admitting, for argument's sake, what has been contended, that the ministers who negotiated the

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treaty exceeded the powers granted them, 'certainly the ratification of that instrument by Congress confirmed and legalized all that had been done by them ; and if it could be supposed, as has been said, that Congress in the ratification of it exceeded the powers vested in them by the State, the act of Assembly of this State passed in 1787 must have extinguished every scintilla of doubt as to its validity and obligatory force on their citizens. That act is a perfect recognition of the whole treaty, declares it to be part of the law of the land, and directs the judges to decide accordingly. The last-mentioned act must surely be sufficient to satisfy the mind of the most scrupulous and skeptical. For myself, I do not hesitate to declare that it adds nothing to the validity and legality of the treaty ; that its ratification by Congress was alone sufficient, and that the act of Assembly of the State was superfluous.

The counsel for the defendant has contended that by the operation of the acts of confiscation and the payment into the treasury, the plaintiffs were wholly divested of their right, and the same, if existing at all, was vested in the State. This forms a material part of his defence, and if it had been clearly evinced that the right of the plaintiffs was wholly extinguished by the operation of the confiscation acts, and could not possibly be revived or restored by any subsequent act of the State or the nation, it would follow of course that they could have no demand against the defendant. In support of this argument, it is said, 4 Bacon, 637, that all acts done under a statute while in force are good notwithstanding a subsequent repeal. I am ready to admit the principle in its fullest extent, in the exposition of a statute or municipal law of any particular State. It is consonant with reason, and is justified by the necessity of the case. It prevents much confusion and embarrassment, and insures a ready submission to the laws, by a confidence in the security impliedly promised to such obedience.

If the treaty was now to be considered as an act of the State, and emanating from the same authority only that produced the acts of confiscation, this reasoning might be solid. But such an instrument as the treaty of 1783 cannot be subject to the ordinary rules of construction which govern the exposition of stat-

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utes of a particular State. They have for their object the regulation of the rights of a distinct community or society only, whose interests being similar, are equally affected by a uniform regulation of their rights; who are alike united by the allegiance due to and protection from the same government. That is not the case with a compact formed between two separate and distinct nations, relative to certain specified subjects which involve interests of their respective citizens or people, unavoidably clashing with each other.

The one is an act of a State, but a component part of the nation providing for the benefit of its own citizens. The other a compact of the whole nation (of which that State is but a part) with another nation which must necessarily control all acts issuing from the inferior authority which might contravene it. This is evinced by that plain and strong expression in the Constitution of the United States, which declares that all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding. Taking it for granted, then, that the treaty is not to be governed, when in opposition to particular laws, by the rigid rules of the common law, nor to be restrained in its operation by any statute of any particular State, "but that it ought to be interpreted in such manner as that it may have its effect, and not be found vain and illusive," I will proceed to consider of the operation of the 4th article.

"Art. 4th. It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

This article appears to me so clear, precise, and definite that one would be at some loss to select other words to render it more so. But it has been contended by the defendant's counsel that by a true construction of this article, it will appear much less general than the expressions would warrant; that it is a provision for real British subjects only, that is, persons resident in Great Britain at the commencement of the war; a term used in

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contradistinction to many other descriptions of people who in the course of the war took part with that nation; and that this construction is justified by the term *sterling money*. In order to support this exposition a reference has been had to the 5th and 6th articles.

The 4th article contains the only stipulation with respect to debts. In the whole instrument it is mutual and general in its expression, not limited or restrained by any particular words to any description of persons, as is evident in the 5th article. If that had been in the contemplation of the parties, they could not have overlooked the necessity for these distinctions, nor are we at liberty to presume it. In the next article the distinction is made with great accuracy with regard to those who may endeavor to procure a restitution of their lands and other property. With respect to the expression *sterling money*, it appears to me that was probably concluded on as a standard whereby to estimate the value of money due, it being no doubt apprehended that a depreciated paper medium circulated in many States of the Union, the nominal sum in which might not produce the intrinsic value of the debt due.

Another construction has been placed on this article, equally, in my opinion, unfounded with the foregoing. It has been said the article was only intended to take off from British subjects their disability as alien enemies to sue. Every one knows that disability can only exist during the continuance of a war; it would have been, therefore, unnecessary to provide for it in a treaty of peace, when it is obvious the peace itself, agreeably to the long-established principles of law, removed all such disability without any special stipulation. The word *recovery* admits of such an idea. The terms *sue* and *recover* have very different import in practice. The difference is daily exemplified in our courts, and the distinction appears evident in the body of that instrument. In the latter part of the 5th article it is stipulated that certain persons shall meet with no lawful impediment in the prosecution of their just rights. In the 4th article the words are, no lawful impediment to the recovery of their debts. The distinction is obvious, and the terms aptly applied in each case. In the former, relative to lands and other property which

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had been confiscated, and a restoration of which entirely depended on the liberality of the legislatures, the term recovery would have been improper; in the latter, in which a payment to the creditor was positively stipulated, the expression is correct. Vattel says, page 369, "When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty presents; to go elsewhere in search of conjectures, in order to extinguish or restrain it, is to endeavor to elude it."

It is therefore my opinion that this article does control the operation of the acts of confiscation relative to debts; that the plaintiffs in this case are entitled to recover on the first demurrer, the plea in that case being the strongest ground of defence made by the defendant; that, therefore, judgment be given for the plaintiffs on each of the demurrers. The State, who has compelled the payment from the creditor by a threat of severe punishment, will certainly feel bound by every principle of moral obligation to reimburse, in the most ample manner, all those who have made such payments. In addition to the moral tie that it is bound by, a solemn promise so to do is clearly expressed by an act of the legislature.

I have only to observe that I have considered this case as of the utmost importance; that I have given it all the attention and consideration in my power to bestow at this time and place; that if my opinion is founded in error, which is possibly the case, happily for the defendant there is a higher tribunal where the error may be corrected.

ELLSWORTH, C. J.—It is admitted that the bond on which this suit is brought was executed by the defendant to the plaintiffs, and that the plaintiffs have not been paid. But the defendant pleads that since the execution of the bond a war has existed, in which the plaintiffs were enemies, and that during the war this debt was confiscated, and the money paid into the treasury of the State; and the plaintiffs reply that, by the treaty which terminated the war, it was stipulated that creditors "on either side should meet with no lawful impediment to the recovery of *bona fide* debts heretofore contracted."

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Debts contracted to an alien are not extinguished by the intervention of a war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it, and also because a transfer of the treasure from the country to his nation would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities these reasons, and the suspension of the remedy, cease.

As to the confiscation here alleged, it is doubtless true that enemy's debts, so far as consists in barring the creditor and compelling payment from the debtors for the use of the public, can be confiscated, and that on principles of equity, though perhaps not of policy, they may be, for their confiscation, as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted, not from the duty to which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and, indeed, a strong interest in supporting. Civil war, which terminates in a severance of empire, does, perhaps less than any other, justify the confiscation of debts, because of the special relation and confidence subsisting at the time they were contracted, and it may have been owing to this consideration, as well as others, that the American States, in the late Revolution, so generally forbore to confiscate the debts of British subjects. In Virginia they were only sequestered; in South Carolina all debts, to whomsoever due, were excepted from confiscation; as were in Georgia those of British merchants and others residing in Great Britain. And in the other States, except this, I do not recollect that British debts were touched. Certain it is that the recommendation of Congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended among others, to the debts of the plaintiffs, providing, however, at the same time, as to all debts which should be paid into the treasury under that act, that the State would indemnify the debtors should they be obliged to pay again.

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Allowing then, that the debt in question was in fact and of right confiscated, can the plaintiffs recover by the treaty of 1783?

The 4th article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted."

There is no doubt but the debt in question was a "*bona fide*" debt, and theretofore contracted, *i. e.*, prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditor should have been on different sides with reference to the parties to the treaty; and, as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the king of Great Britain; and it is pretty clear, from the pleadings and the laws of the State, that they were so. It is true, that on the 4th of July, 1776, when North Carolina became an independent State, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclination. But the State afterwards, in 1777, liberally gave to them with others similarly circumstanced, the option of taking an oath of allegiance, or of departing the State under a prohibition to return, with the indulgence of a time to sell their estates, and collect and remove their effects. They chose the latter, and ever after adhered to the king of Great Britain, and must therefore be regarded as on the British side.

It is also pertinent to the inquiry whether the debt in question be within the before recited article, to notice an objection which has been stated by the defendant, *viz.*, that at the date of the treaty, what is now sued for as a debt, was not a debt but a nonentity; payment having been made, and a discharge effected under the act of confiscation, and therefore that the stipulation concerning debts did not reach it.

In the first place it is not true that in this case there was no debt at the date of the treaty. A debt is created by contract, and exists until the contract is performed. Legislative interference to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the

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creditor the protection of law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently enforced.

Secondly, it was manifestly the design of the stipulation that where debts had been theretofore contracted there should be no bar to their recovery from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction would be to leave creditors to a harder fate than they have been left to by any modern treaty.

Upon a view then of all the circumstances of this case, it must be considered as one within the stipulation that there should be "no lawful impediment to a lawful recovery." And it is not to be doubted that impediments created by the act of confiscation are lawful impediments. They must therefore be disregarded if the treaty is a rule of decision. Whether it is so or not remains to be considered.

Here it is contended by the defendant's counsel that the confiscation act has not been repealed by the State; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged.

As to the opinion that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will and of high authority, but it is controlled by the public will subsequently declared. Hence the maxim that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty, when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will as much so as a statute can be. And it does, therefore, of necessity annul any prior statute so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made on the part of the United States, by a congress composed of deputies from each

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State, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act and law of every State.

If, however, a subsequent sanction of this State was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this State, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789 was adopted here the present Constitution of the United States, which declared that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land, and that the judges in every State should be bound thereby; anything in the constitution or laws of any State to the contrary notwithstanding. Surely, then, the treaty is now law in this State, and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged, that annulling the confiscation act cannot annul the defendant's right of discharge, against which the act was in force.

It is true, that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant to be as substantial as a right of property can be, that he may be deprived of it, if law so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the State, the rights of individuals. And they are afterwards indemnified or not according to circumstances. What is most material to be here noted that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments," all of which in this case, the treaty, as I apprehend, removes.

Let judgment be for the plaintiffs.

Statement of the case.

In the Circuit Court of the United States, for the District of Virginia, at Richmond, November, 1799.

BANKS v. GREENLEAF.*

G., a citizen of Maryland, gave his bond, in Virginia, to B., a citizen of Virginia, and afterwards, in Maryland, became a bankrupt by the laws of Maryland, under which he was duly discharged by the competent tribunal of Maryland under a general direction with respect to his creditors. This did not discharge him in a suit afterwards brought upon the bond in Virginia.

SOME years past, Greenleaf, a citizen of Maryland, became indebted, by bond given in Virginia, to Banks, a citizen and inhabitant of the State of Virginia. Afterwards, Greenleaf took the benefit of the bankrupt laws of Maryland; and being arrested for the foregoing debt in this court, he pleaded the discharge, under the bankrupt laws of Maryland, in bar of the claim. To this plea the plaintiff demurred; and the defendant joined in the demurrer.

Bennet Taylor, for the plaintiff, contended, that the plaintiff and defendant, not being citizens of the same State, the laws of Maryland did not bind the plaintiff. For the several States are sovereign and independent of each other, 2 Wash., 298, and therefore, the laws for one cannot, for transactions out of its limits, bind the citizens of another more than two unconnected countries can bind the subjects of each other. Co. Bank. Law, 243; Wythe's Ch. Decis., 133; *James v. Allen*, 1 Dall. Rep., 188.

Randolph, contra.

The discharge, under the bankrupt laws of Maryland, is a complete bar to the plaintiff's action. All countries make laws against absentees; and, if they are improper, it is a State and

* This report is taken from 6 Call's Virginia Reports, p. 271.

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not a judiciary question. *Robinson v. Bland*, 1 Black., 258, takes the distinction between local and general statutes, making the latter to be obligatory in other countries. But *Solomon v. Ross*, 1 Hen. Black., 131, is decisive; and proves the universal effect of bankrupt laws, with respect to personal actions, which is confirmed by Martin's Law of Nations, 104. There is no difference as to the obligation, whether it be a judiciary or legislative act of a foreign country. Besides, in this case, the Court of Chancery in Maryland has acted with regard to the creditors at large of the bankrupt; and so far as it may be called judicial.* The Articles of Confederation between the United States give the inhabitants of one State all the benefit of the other States; and if they took the conveniences they should sustain the inconveniences. This, necessarily, results from the reciprocal rights of citizens of different States, because they are all, as it were, citizens of each State. The case of *Millar v. Hall*, 1 Dall., 229, is expressly like this, and ought to govern it. The Constitution itself establishes the reciprocal respect due to laws of one State in another, and our doctrine is not repelled by the power of Congress to make bankrupt laws; because what we contend for only applies until Congress have acted on the subject. *Cur. adv. vult.*

WASHINGTON, J.—The principles laid down by Huberus, and universally acknowledged, are, that the laws of every government have force within the limits of the government, and are obligatory upon all who are within its bounds, whether subjects or temporary residents. They have no effect *directly* with the people of any other government, but, by the courtesy of nations, to be inferred from their tacit consent, the laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to the rights of such other government or its citizens. This principle is universally admitted among all civilized nations, and has

* This was merely the order of the Chancellor with respect of the creditors in general of the bankrupt, and did not relate to this case in particular, nor was the petitioning or suing before him.

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grown out of mutual convenience which they experience from it. "For," says the same author, "nothing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place should be rendered of no effect elsewhere by a severity of law."

From these principles has arisen the doctrine admitted by all, that whoever makes a contract, in any particular place, is bound by the laws of that place as a temporary citizen.

So a will or conveyance of movable property, executed according to the forms prescribed by law where made, has effect in every country, though not consistent with the forms or ceremony there observed.

But there are certain exceptions from and modifications of these rules, some of which it may be proper to mention.

As if a person shall go into a foreign country to perform a particular act, with a view to elude the laws of his own country *in fraudem legis*.

So the effect of a contract, made in one place, will be allowed according to the laws of that country, if no inconvenience results therefrom to the citizens of the country where those laws are sought to be enforced, for the courtesy of nations could not be supposed to go so far as to admit the force of foreign laws to produce a prejudice to its citizens, to which they had, by wont of their own, submitted.

So if the law of a place where a contract is made be contrary to the laws of our own country, in which a contract is also made inconsistent with a contract made in another place, we should observe our own law rather than the foreign one.

Let us proceed to examine this case, according to these rules :

The contract in question was made in Virginia, by a citizen of Maryland with a citizen of Virginia. The contract is, therefore, subject to the laws of Virginia ; and the question is, whether the laws of a foreign country (if Maryland be such) discharging a contract, can be admitted here ?

The rule is, that the laws of a foreign country prevail if not prejudicial to the country or its citizens, and this is merely gratuitous ; but to admit them to prejudice its own citizens, would be a courtesy bordering on quixotism.

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No government would submit to it; no government can be presumed to have tacitly submitted to this.

But if the citizens go abroad and submit to their laws, as temporary subjects, they must be bound by them, though to their prejudice; if they make a contract there, the law of that country is to prevail.

In this case it would be a matter of choice; if the laws of that country give effect to the contract, he must submit to their laws which discharge it.

If a will or deed is made abroad, or matrimony contracted, all the consequences follow. But if the parties have never so submitted, no government would permit a citizen to be prejudiced by foreign laws.

Here are two conflicting laws. One giving validity to a contract, and governing it throughout to its discharge; and the other discharging it in a manner different from and in violation of the contract, and the appeal is made to our laws.

Which is to prevail? The rule is, *magis est ut in tali conflictu, ut jus nostrum, quam jus alienum, servemus.*

The contract in question obliges Greenleaf to pay Banks so much money. The law of Maryland says he may deliver himself by paying a part. If this be valid here, it would have been so if it had said he should deliver himself without paying any part.

These laws are contradictory to each other. What, then, says the law of nations upon this subject? That the law of the country where the contract is made shall prevail; and if the law of a foreign country be inconsistent with ours, ours shall prevail.

I think the rule may safely be laid down, that if a foreigner come into our country, and there enter into a contract, the laws of his nor any other foreign country can, in our courts, be received to control, alter, or discharge it, unless the parties, by some act of their own, submit to the laws of such foreign country.

Let us examine the cases which have been cited at the bar, and see whether they throw light upon this subject.

The first case which I shall notice is that of *Warder v. Arell*,

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in the Court of Appeals of this State, 2 Wash., 298. In that the contract was made in Pennsylvania, and discharged under the laws of that State.

That case lays down the rule as stated by Huberus, that the contract having been made in Pennsylvania, the laws of that State must govern, not as to the form, validity, or construction of the contract, but as to the discharge, for this was the only question. The expression of all the judges in that case are remarkably strong to prove that the ground on which the laws of Pennsylvania, operating to produce the discharge, prevailed, was, that the contract was made there.

Divisme v. Martin, Wythe's Decis., 133, was the case of British subjects altogether, but the Chancellor states generally that the remedy of an American creditor against the bankrupt would not have been affected by the transfer of the bankrupt's effects to the assignee under the English law.

Whether, if the contract has been made in England, he would have so decided, does not appear, nor was it necessary, since that was not the case before the court.

In *James v. Allen*, 1 Dal., 188, it does not appear where the contract was made. If in Pennsylvania, I concur in the decision. If in New Jersey, I do not; because in such a case, the decision would go too far, if I am correct in the principles before laid down.

Miller v. Hall, 1 Dall., 229, is obscurely reported, as to the state of the case, for it is doubtful whether the agreement, which is said to have been executed in Pennsylvania, was the one made by Miller and Hall with the owners of the goods, or the articles of copartnery between Miller and Hall. The suit, as I understand it, was brought by Miller to recover his proportion of the commission upon goods sold in Massachusetts; if it means the former, then unquestionably the cause of action arose in Massachusetts, and Hall had by no act of his submitted to the laws of Pennsylvania; if the latter, it might be a doubtful matter where it arose. The doctrine I admit is laid down very broad by the chief justice, and I do not know of any case which has gone so far as this.

Emory v. Grenough was decided before Judge Iredell, in the

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Circuit Court of Massachusetts. The parties were citizens of Massachusetts, and the debt contracted there. The debtor afterwards became a citizen of Pennsylvania (not *in fraudem*), and obtained a certificate of bankruptcy, and pleaded it in Massachusetts, but it was not allowed.

Judge Wilson, however, decided a similar case otherwise.

We come now to the British decisions.

Solomons & Ross, 1 H. Bl., 131; *Jollet & Rietveldt v. Deponthieu*, 1 H. Bl., 132; *Neal v. Cottingham*, 1 H. Bl., 132; 1 Bac. Ab., 434, are all alike. The debts were contracted, it is probable, in Holland, at all events it does not appear that the creditors had been in Holland, and there became the creditors of the bank. 1 H. Black. Rep., 131. *Sill v. Worswick*, 1 H. Black., 694, was a contract between British subjects, and the contract was made there.

It is, in this case, that the doctrine was laid down, that personal property has no locality, and is subject to the law which governs the person of the owner, but the meaning of the judge, as to this general expression, is explained, for he says, as to the disposition of it, and its transmission by succession, or the act of the party. This is all true, all is consistent with the principles laid down. He does not contend that a contract made in St. Christopher should be governed by the laws of England, but that in such a case as the one he was speaking of, the government of St. Christopher, and all others, would give effect to the bankrupt laws of England, and so they ought.

But the case of *Warring and others v. Knight*, mentioned by the judge, proves clearly that the place of contract would make a difference. He says that it does not appear whether the person was a resident in Gibraltar, prior to the bankruptcy, or the debt was contracted there, or whether he appeared to the suit, facts which would have materially altered the decision.

In the case reported in Brown's Ch. Rep., 376, of a payment made in Carolina, the chancellor relies upon the circumstance that the debt was contracted there.

Thus, I think, it is clear that the cases which touch this point do in general support, and that there is not one which contra-

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dicts it, unless it be that of *Sutter & Hart*, which I am not clear does so.

I will admit it is a hardship upon Greenleaf, but it would be equally hard upon Banks, and therefore it is more proper to observe our law than that of Maryland.

This cannot be considered as a judgment of a Maryland court, which can bind persons residing out of that State; they are no parties to it; the claim of the plaintiff has not been litigated, after the plaintiff and defendant had submitted to the laws of that country, and had a dispute settled and adjudged.

Admiralty causes bind all the world, because decided upon the laws of nations, and for the convenience of all nations.

But the justice of other decisions may be questioned, and if a law of a foreign country were to declare that a decision of causes, without notice, should bind everybody, no foreign country would observe it.

Our attachment law is fair and just, and would be regarded everywhere.

The next point is, whether Maryland, as to her municipal regulations, is to be considered foreign to this State?

Although I am clearly of opinion that the General government derives its existence and power from the people, and not from the States, yet each State government derives its powers from the people of that particular State. Their forms of government are different, being derived from different sources, and their laws are different. Those of one State are as little obligatory upon another, as those of a foreign country. They are not as represented, and have no control over those who made them. They cannot be said to owe allegiance to any State in which they do not reside.

What effect, then, has the 1st section of the 4th article of the Constitution upon this subject? Read it as if it only said, full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. But for this it would be foreign, and their validity might be questioned. But this clause forbids it. Full faith must be given. Therefore you cannot question the validity of the judgment.

This is the construction given in the case of *Armstrong v. Car-*

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son's Executors, in the Circuit Court of Pennsylvania, by Judge Wilson, where the doctrine was so laid down by Bradford, and admitted by Ingersol. 2 Dall., 302.

But if there be a doubt upon those words, those which follow remove it.

Congress is to prescribe the manner in which they shall be proved, and the effect thereof.

The demurrer is sustained.

*United States Circuit Court, District of North Carolina, at
Raleigh, 1796.*

JONES v. NEALE & BLOUNT.*

Where a deposition was taken *de bene esse* under the 30th section of the Judiciary Act of 1789, of a witness who resided at a distance greater than a hundred miles from the place of trial, but within the process of the court, and the witness was in good health at the time of trial, and had been duly subpoenaed to appear at the trial, and had failed to appear, but the deposition had not been delivered into court by the magistrate who took it, nor sealed and directed to the court as required by the statute, *held*, that it could not be read.

DEBT on bond.

To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about one hundred and thirty miles from Raleigh. It appears that the witness had been subpoenaed by the plaintiff, but did not attend, and that he was at home in good health.

The deposition was offered as one taken in pursuance of the 30th section of the act of Congress, entitled, "An Act to establish the judicial courts of the United States," approved 24th December, 1789, which provides for the taking depositions *de bene esse* in certain cases, one of which is, where the witness shall live

* From Francis Xavier Martin's Notes of North Carolina Decisions, 81.

Objections by defendants' counsel.

at a greater distance from the place of trial than one hundred miles.

Two objections were made by defendants' counsel to the reading this deposition :

1. That it was taken *de bene esse* only, and therefore could not be read unless the party offering it first proved that the personal attendance of the witness could not be obtained. But here it appeared that he was within reach of the process of the court, and in sufficient health to attend.

2. That the certificate of the magistrate who took the deposition did not set forth the reasons of taking it, which is made necessary by the act of Congress.

To the first objection it was answered by the plaintiff's counsel that the manifest intention of the act is, that those circumstances which authorize the taking of a deposition *de bene esse* should, if they exist at the time of trial, entitle it to be heard. That the residence of the witness at a greater distance from the place of trial than one hundred miles is by the act placed on the same footing with his age, infirmity, going to sea, etc., and is equally a good cause for taking his deposition *de bene esse*. But the age or infirmity of a witness would without doubt excuse his non-attendance, and entitle his deposition to be read, and there is good ground to infer the same of this residence at a greater distance from the place of trial than one hundred miles.

This construction is greatly corroborated by that clause of the act which defines the evidence admissible on appeals, but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpœnaed, which was all that could be required to enforce his attendance, and if that proved ineffectual, the deposition ought to be read.

To the second objection, that the act of Congress requires the magistrate taking the deposition to certify the reasons of taking it, in order to save the party at whose instance it is taken the trouble and expense of bringing witnesses from a great distance to prove the age, infirmity, etc., of the witness examined, but it left the party at liberty to incur this trouble and expense if he thought proper, as in taking depositions under commissions is-

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sued from the State courts of this State, the party at whose instance the deposition is taken may procure the commissioner to certify that notice of the time and place of caption was given to the adverse party, and such certificate is received by the court as conclusive evidence as to that point, but if the commissioner fail to certify, the party must establish the fact.

PATTERSON, J., and SITGREAVES, J.—It appears to be the true construction of the act of Congress that those circumstances which will warrant the taking of a deposition *de bene esse* should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law, it must be strictly construed and literally observed. To fail in one iota of the ceremonies prescribed by it is to fail in the whole.

The act requires that the deposition shall be retained by the magistrate taking it until he deliver the same with his own hands into the court for which it is taken, or be by him sealed up and directed to such court. This part of the act has not been observed, therefore the deposition cannot be read.

Badger & Taylor for the plaintiff.

Woods for the defendants.

*Circuit Court of the United States, Eastern District of Virginia,
at Richmond, June, 1876.*

W. S. GURNEE v. THE COUNTY OF BRUNSWICK.*

1. The Board of Supervisors of the county, under the laws and Constitution of Virginia, is not a court, and a petition by a creditor to the board, praying the allowance of his claim, is not a suit. But where an appeal is taken from the decision of the board to the County or Circuit Court, it then becomes a suit, and the jurisdiction of such court is original and not appellate.

* This report is taken from the Virginia Law Journal, vol. i, p. 301, May number, 1877.

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2. To remove a cause from a State court to the Circuit Court of the United States, under the act of March 3d, 1875, application must be made at or before the first term at which the cause may be tried, *i. e.*, when the cause is ready for trial, although the court and parties may not be ready to try it.
 8. Under the laws and practice of Virginia an appeal to the County or Circuit Court of the State from a decision of the Board of Supervisors, disallowing a claim against the county, is triable at the first term of the court after the appeal is taken, *without pleadings*, and an application to remove the cause to the United States court, under the act of March 3d, 1875, must be made at that term; if made afterwards, and the removal is effected, the United States court is without jurisdiction, and the cause must be remanded.
- Quære.*—Whether subdivision third of section 689, U. S. Revised Statutes, allowing the removal of causes from the State to the United States courts, on the ground of *prejudice* and *local influence*, has been repealed by the act of March 3d, 1875.

MOTION to remand the cause to the Circuit Court of Brunswick County.

Legh R. Page and *J. A. Jones*, in support of the motion.
Sheffey & Bumgardner and *R. B. Davis*, *contra*.

WAITE, C. J.—Gurnee, the plaintiff, a citizen of the State of New York, being the alleged owner of certain bonds of the county of Brunswick, Virginia, on which there was a large amount of interest due and unpaid, on the 9th of January, 1875, presented his account for the same to the Board of Supervisors of the county, stating each item and the nature thereof separately and specifically, and praying for an order of the board directing the treasurer of the county to pay him the amount then due; that a levy might be made on the county to raise the sum necessary to pay off the debt, and generally, that such orders might be made and acts done as should be necessary to secure to him the payment of the sum then due, and such further sums as might thereafter accrue to be due and payable as interest upon the bonds, at the times, for the amounts, and in the manner set forth on the face of the bonds.

His account was disallowed by the board, and he thereupon, in due time, appealed to the County Court of the county. At

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the proper time the clerk of the board made his report to the court as follows :

" I respectfully report to your honor, that, on the 9th January, 1875, W. S. Gurnee presented to the Board of Supervisors of said county a petition (a copy of which is hereto annexed, marked 'A,' and made part of this return) asking for the payment of a certain sum of money claimed to be due by the county of Brunswick to said Gurnee as interest in arrear and unpaid upon certain bonds of said county, executed to the Norfolk and Great Western Railroad Company, and the said board wholly disallowed the claim of the petitioner and refused the prayer of the petition. The said W. S. Gurnee, by his counsel, appealed and gave the notice, and executed the bond required by law, which notice and bond are herewith returned."

This report, with the petition, notice, and bond, were duly filed in the County Court, where, on the 22d February, 1875, by consent of parties it was ordered that the case be removed to the Circuit Court of the county. The files were thereupon transferred to the Circuit Court, and, on the 21st April, 1875, an order was there entered continuing the cause until the next term. At another term, and on the 18th October, 1875, the following entry was made :

"On motion of the defendant, and for reasons appearing to the court, it is ordered that this cause be continued at the costs of the defendant until the next term."

In vacation, and previous to a term to be held in April, 1876, on motion of Gurnee, an order was made for the issue of a *sub-pœna duces tecum* for the appearance of a witness to testify in his behalf and the production of certain books and papers at the court-house, April 15th, 1876. Depositions were taken by Gurnee on the 10th, 11th, and 12th March, 1875, and filed in the cause.

No pleadings in form were filed by either party, and no orders were made by the court, or so far as appears, asked for in that behalf.

On the 13th April, 1876, Gurnee filed his petition and bond under sections 2 and 3 of the act of March 3d, 1875 (19 Stat., § 470), for the removal of the cause to this court, upon the ground of the citizenship of the parties. The record does not show that any action was taken by the State court upon this petition, but

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the papers were in due time filed and the cause docketed in this court.

The defendant, on the 19th May, 1876, moved that the cause be remanded to the Circuit Court of the county. The questions now presented for consideration arise upon this motion.

Two objections are made to the jurisdiction of this court, to wit:

1. That the case was not removable because it came into the Circuit Court of the county upon appeal and for review of the decision of another judicial tribunal.

2. That the petition for removal was not filed in the State court before or at the term at which the cause could have been first tried.

These objections will be considered in their order:

1. Did the Circuit Court of the county take jurisdiction of the cause under its appellate or original jurisdiction?

Art. II of the Constitution of Virginia is as follows: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided." Art. VI relates to the judiciary department, and provides (sec. 1) that, "there shall be a supreme court of appeals, circuit courts, and county courts," and corporation or hustings courts in cities and towns (sec. 14); and (sec. 22) that all judges shall be commissioned by the governor. Art. VII relates to county organizations. Each county is to be divided (sec. 2) into townships, and each township is required, among other things, to elect annually one supervisor. These supervisors of the townships are constituted a board of supervisors of the county, and are required to assemble at the court-house on the first Monday in December in each year, and audit the accounts of the county, examine the books of the assessors, regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the various townships, and perform such other duties as shall be prescribed by law. By sec. 5 it is made the duty of the General Assembly, at its first session, after

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the adoption of the Constitution, to pass such laws as should be necessary to give effect to the provisions of this article. The legislation, under this power, so far as it is important to the consideration of this case, is found in tit. 16, chap. 47, of the Code of Virginia of 1873, 438, *et seq.* By this it is provided (sec. 2) that the supervisors of the several townships in each county shall constitute the board of supervisors of the county, and that they may sue or be sued in relation to all matters connected with their duties as such board. They may have a seal (sec. 7). They are empowered to examine, settle, and allow all accounts chargeable against the county, and, when so settled, to issue warrants therefor as provided by law (sec. 6, subdivision 2). No person can maintain an action against a county upon any claim or demand, other than a county order, until he shall have first presented it to the board of supervisors for allowance (sec. 14). No account can be allowed by the board unless the same shall be made out in separate items, and the nature of each item specifically stated. It is made the duty of the attorney of the commonwealth (who is a county officer elected by the people, Art. VII, sec. 1, Const.) to represent the county before the board. He is required to resist the allowance of any claim which is unjust, or not before the board in proper form, or upon proper proof, or which for any other reason ought not to be allowed. When a claim has been allowed which is improper or unjust, he may appeal from the decision of the board to the county court (sec. 10). If a claim is disallowed, the person presenting it may appeal to the county court by causing a written notice of the appeal to be served on the clerk of such board, within thirty days of the time of making the decision, and executing a bond in the form prescribed (sec. 12). When the appeal is taken, the clerk of the board is required immediately to give notice thereof to the attorney for the commonwealth, and to make a brief return of the proceedings in the case before the board, with the decision thereon, and file the same, together with the bond and all the papers in the case in his possession, with the clerk of such court; and the appeal is to be entered, tried, and determined the same as appeals of right from an order of a county court in a controversy concerning a will (sec. 13).

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The determination of the board of supervisors disallowing a claim is final, and a perpetual bar to any action in any court founded upon such claim, unless the appeal shall be taken, or unless the board shall consent to the institution and maintenance of such an action. If judgment is recovered against the county upon the appeal, it is made the duty of the board of supervisors, to provide for the same in the next county levy, and for the treasurer to pay the money, when collected, to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher. If payment shall not be made before the first day of December next succeeding the levy, execution may issue upon the judgment, but not before (sec. 15).

From this recital it is apparent that the board of supervisors is not a court, and that the proceedings there is not a suit. In the *Sewing Machine Cases*, 18 Wall., 585, a suit was defined to be, "Any proceeding in a court of justice, in which a plaintiff pursues his remedy to recover a right or claim." The board are the representatives of the people elected to supervise the business of the county, which has been, by law, committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. A part of their duties is to "examine, settle, and allow accounts," chargeable against the county, and when settled, to issue warrants and levy taxes for the payment. They are the officers charged by law with the duty of auditing claims. Demand of payment must be made on them; they alone represent the county for that purpose. When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing, they do not act judicially. They simply recognize the claim as valid against the county, and allow it, or they reject it. They render no judgment and issue no execution. Their duty is to direct payment of the accounts by the proper officer, and to provide him with the necessary means for that purpose by taxation. When they have made their allowance, the account has become liquidated, and may be sued without further demand. All these duties are purely administrative, and the proceeding by which their performance is enforced partakes in no respect whatever of the character of a suit.

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There are no parties, save the claimant and the board; the board occupy one side, and the claimant the other. It is true the attorney for the commonwealth is required to represent the county, and resist improper allowances, but in this he appears rather as the legal adviser of the board than as the manager of the cause of a litigant. Apply another test. The act of Congress provides for the removal, under certain circumstances, of any suit of a civil nature, at law or in equity, pending in any State court. If the board were a court, and the proceeding before them a suit, the case could have been removed while pending before the appeal. But the right of such removal, we think, will hardly be claimed, for the obvious reason that the relief asked of the board is administrative only, and not judicial. They were asked to pay, not to enforce payment. If, however, the board disallow the claim, and refuse to provide for its payment, judicial action becomes necessary. For this an appeal is given to the courts—not an appeal from one court to another, but to a court from the executive. By the appeal a suit is commenced, and thereafter the proceeding is judicial. The notice to the clerk is equivalent to a summons and service in ordinary actions. Under the appeal the case does not come up for review, but for original adjudication. All previous to the appeal was preliminary to the commencement of the suit.

There is nothing in the form of the commencement which makes the proceeding anything else than a suit. The form of commencing actions is always within the control of the legislature. It is "due process of law" within the meaning of the Constitution of the United States, if there is lawful notice to appear, and time and opportunity to answer and defend. The form of the notice is not important, if there is notice in fact. The States may prescribe the form of a remedy in their own courts for every case. Here a demand is required before a suit can be commenced. There is nothing unusual or inequitable in this. It is no more than providing that contracts of the counties for the payment of money are contracts to pay after demand actually made in the manner required by law. Upon such contracts demand must always be made before suit is brought. The provision further in this case is, that after refusal to pay upon

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demand, suit shall be commenced in a certain form or not at all. This is certainly within the power of the legislature, so far as it relates to proceedings in the tribunals of the State.

From this it is apparent that the case, at the time of the removal, was pending in the State court under its original and not under its appellate jurisdiction, and that the first ground urged in support of this motion is not sustainable.

2d. Was the application for the removal made in time?

The right of removal is a statutory right. To support the jurisdiction of this court, therefore, the plaintiff must bring himself strictly within the provisions of the statute.

The law requires that the petition for removal shall be filed in the State court "before or at the term at which said cause could be first tried, and before the trial thereof."

A cause cannot be tried until in some form an issue has been made up for trial. The pleadings or statements necessary to make the issue are regulated by the practice in the court where the trial is to be had. As soon as the issue is made up, the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal to be in time must be made before or at this term.

This case is one to be "entered, tried, and determined, the same as appeals of right from an order of the county court in a controversy concerning a will." In such cases, the first duty of the court is to summon the persons interested to appear on a certain day, and, when they have been summoned or have otherwise appeared as parties, to proceed and hear the motion for probate. If any person interested asks it, the court must order a trial by jury to ascertain whether the paper produced is the will of the decedent, but if no such trial be asked the court must proceed without to decide the question of probate. Code 1873, ch. 118, secs. 29, 31, 32.

A summons from the court was not necessary in this case, even if it would have been otherwise required, because the record shows that the parties appeared in the county court on the 22d of February, and consented to a removal to the circuit

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court of the county. An appeal of right in a controversy concerning a will, carries a cause into court as upon a motion for probate. By analogy, then, this cause stood in the circuit court of the State upon its removal there, as upon a motion for judgment and notice served. Such a motion is authorized by the Code of Virginia in cases where a person is entitled to recover money by action on any contract. Code 1873, ch. 164, § 6. And an established practice exists in the courts in reference to such proceedings.

Before every term of a circuit court in Virginia, the clerk is required by law to make out a "docket of the following cases, to wit: First, cases of the commonwealth; second, motions and actions, in the order in which the notices of motion were filed, or in which the proceedings at rules in the action were terminated," and this docket is "to be called, and the cases for trial disposed of for the term, in that order, except that the court may, for good cause, take up any case out of its turn." Code 1873, ch. 173, § 1.

No provision is made for pleadings in motions for probate upon appeal or in motions for judgment, and none is necessary. The form of the proceeding is such as to require the plaintiff to make out his case by proof, whether the defendant appears to defend or not. No judgment can be taken by default. Nothing is confessed by a failure to plead. The case stands from the time it comes into court as it would if a declaration had been filed and the general issue pleaded.

The itemized account, with the specific statement of the nature of each item, presented to the board and sent to the court upon the appeal, constitute all the pleadings necessary to put the case in a condition for trial. The circumstances of a case may be such as to make it desirable that issues should be presented more specific than those which come up in this form. If so, the court may order accordingly, either upon its own motion or that of the parties. Such issues may simplify the trial when it is had, but there may be a trial without them. For all the purposes of the present inquiry, such orders for specific issues may be likened to amendments to pleadings after issue has once been joined. They

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change to some extent the character of the trial to be had, but the court could have proceeded without them.

This case was placed upon the docket which the clerk was required to make, at the April term, 1875, and also at the October term of the same year. It certainly must have been in a condition for trial, according to the practice of the court at the October term, for the record shows a continuance then upon the motion of the defendant at its costs. This condition would not have been imposed unless the plaintiff had a right to insist upon a trial if the court did not otherwise direct.

From this the conclusion follows, that the application for removal was not presented in time, and consequently that this court has no jurisdiction of the case.

It is said that a further application will be made to the State court for a removal under the third subdivision of section 639, Revised Statutes, on the ground of prejudice and local influence, and we are asked to decide now whether, since the act of 1875, this part of that section is in force. The point is not made upon the record, and for that reason we must decline its consideration. It cannot now be determined so as to bind the parties.

An order may be entered remanding the cause to the circuit court of the county for such further proceedings as may be proper in the premises.

Bond, Ct. J., concurred.

*Circuit Court of the United States for the Eastern District of
South Carolina.*

CHARLES PARSONS, JR., v. THE GREENVILLE AND COLUMBIA
RAILROAD CO.

The pendency of a general creditor's bill against a defendant in a court of a State, accompanied by the usual orders of injunction* does not necessarily forbid a creditor who is not a party to the bill from suing the same defendant in another court.

* The receiver, though asked for, was not appointed in this case.

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Especially is this so where the prosecution of this creditor's suit is merely for obtaining judgment, and is by proceedings not affecting the property of the defendant; and

More especially is this so where this creditor is the resident of a different State, and brings his suit in a circuit court of the United States.

THE facts of the case are sufficiently stated by the Chief Justice.

WAITE, C. J.—This action is brought to recover the amount due upon certain matured coupons of the second mortgage bonds of the Greenville and Columbia Railroad Company. The only question submitted for our determination is, whether the pendency of a suit instituted by the State of South Carolina against the company in the Court of Common Pleas of Richland County, on the 11th June, 1872, and the injunction granted therein on the 18th of the same month, can be pleaded as a bar to this action.

The State is a creditor of the railroad company, and claims to have a lien upon all the property of the company as security. There are conflicting interests between the creditors, and disputes as to the order of liens. The validity of the bonds, to which the coupons in this suit belong, is denied by some creditors. The object of the suit commenced by the State is to adjust the rights of all parties, by ascertaining the amount due to each creditor, and determining the order in which he is entitled to payment out of the property of the company.

The prayer is as follows :

“Wherefore the plaintiff herein, as well to protect the interests of the State in respect to her guarantee of the bonds of said company as to preserve unimpaired the rights and interests of the creditors of the company in respect to its property, prays judgment against the defendants.

“1. That all the judgment creditors of the defendants be restrained by an order of this court from enforcing their judgment against the property of the defendants.

“2. That all the other creditors of the defendants be restrained by an order of this court from instituting suit against the defendants, or, where they have already instituted suits, from further prosecuting the same.

“3. That a receiver be appointed of all the property, assets, and effects of the defendants, to hold and keep the same subject to the further orders of this court.

“4. That all the creditors of the defendants be required to prove their several debts, claims, and demands against the defendants, in accordance with an order to be herein made by this court.

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"5. That all the property of the defendants and the chartered rights and priorities therefor be sold to foreclose the mortgage to the plaintiff hereinbefore set forth and to bar the equity of redemption of all persons whomsoever, at such time and place as may hereafter be directed by this court.

"6. That the defendant may be adjudged to pay any deficiency that may remain due to this plaintiff after applying all the proceeds of said sale applicable thereto.

"7. That this court will make such other and further orders in the premises as may from time to time be necessary for the protection of the rights and interests of the plaintiff, and to preserve the rights of all creditors of the defendants and such as to equity and justice may appertain."

The injunction asked for was granted, and a further order entered as follows :

"That John T. Green be appointed referee, with directions, by public advertisement for three months in one or more gazettes of this State, New York, and such other places as he may think proper, to call in the creditors of the said Greenville and Columbia Railroad Company to make proof before him of their several and respective claims, with liberty to the Greenville and Columbia Railroad or other parties to reply to such proof; that the said referee shall also take testimony as to the liens set up against the said company, their order of priority, and the amount respectively secured by such liens, with liberty to the said Greenville and Columbia Railroad Company or other parties to be heard in relation to the same; that the said referee make his report in all matters now referred, with leave also to consider and report any special matter which may come before him."

The plaintiff in this action was not named as a defendant in the suit instituted by the State, and has not been served with process therein. He has not appeared or presented his claim before the referee, neither has any receiver been appointed in that action. So far as anything appears in the case, the railroad company is still in the possession and enjoyment of all its property.

The mere pendency of a suit to which a person may be made a party, but has not been, is certainly no bar to an action by him in another court, to enforce his own rights. An injunction binds no one except a party to the suit in which it has been granted, who has been actually subjected to the jurisdiction of the court, either by service of process or voluntary appearance.

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If the action relates to property, which the court has taken into its possession, it may protect its possession by appropriate orders, but it cannot operate upon the person of the owner until he has in some form been brought within its jurisdiction. An injunction acts upon persons, and not upon property except through persons.

In this action, Parsons does not seek to subject the property of the company. His only object is to reduce his debt to judgment. For this purpose he has brought the company into court. His judgment when obtained will only bind the company and those who are bound by its acts. The rights of no other parties will be affected. Being a citizen of the State of New York, and the railroad company a citizen of the State of South Carolina, he had the right to sue in the courts of the United States. Neither the State nor the company could deprive him of this right by any act of their own. This court has obtained jurisdiction of both the company and himself. We can therefore proceed to adjudicate between them. As no defence is made upon the merits, Parsons is entitled to his judgment for the amount of his claim. It will be time enough to consider how he can reach any portion of the property involved in the litigation pending in the State court for the purpose of subjecting it to the payment of his judgment, when he attempts to do so.

Circuit Court of the United States, for the Eastern District of South Carolina.

Ex parte CHARLES PARSONS, JR.

Where a municipal corporation is empowered by law to create a debt by bond, that power carries with it the authority and obligation to levy sufficient taxes to fulfil its contract with its creditor.

Where such tax has not been levied sufficient to meet the debt due to a particular creditor by general levy, it is the duty of the corporation to make a special levy for that purpose or add the required amount to the general levy.

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A court of justice may, by mandamus, compel such a special levy where no general levy has provided revenues sufficient to meet the debt, and a circuit court of the United States may enforce a judgment which it has rendered upon a contract of this character by such a mandamus.

THE facts of the case are sufficiently stated by the Chief Justice.

WAITE, C. J.—The relator recovered a judgment in this court, November 19th, 1874, against the city of Charleston, upon certain overdue certificates of stock or bonds of the city, issued under the general powers of its charter, but without any special requirement or undertaking, either in the charter, ordinances, or certificates, for the levy of a tax to provide the means of payment. Execution has been issued upon the judgment, to which the marshal returned "that he could find no property subject to said judgment and execution, except such as is in public use." Payment of the judgment has been demanded of the city and refused. The city council has also been requested to "levy a tax and provide for the collection of the same, to be applied to the payment of said judgment, principal, interest, and costs," and this, too, has been refused. The city has no property subject to execution.

This is an application for a writ of mandamus requiring the city "to provide for the payment of the aforesaid judgment by enacting an ordinance for the levying and collecting of a special tax to be paid out and applied" for that purpose. The defence is, in substance, that it is not the duty of the city to make such a levy, because no special provision for such a tax entered into the contract upon which the judgment is predicated, and there is no power in the city to make the levy. The only question, therefore, presented for our consideration is whether such a mandamus can issue without a provision for a specific tax for the payment of the debt, either in the contract or in some statute of the State or ordinance of the city.

The authority of the city to issue the stock and become obligated for its payment was conclusively settled by the judgment which has been rendered, and in which this court followed the decisions of the highest court of South Carolina, in *Copes v. Charleston*, 10 Rich. (Law), 491, and *Gage v. Charleston*, 3 Rich. (N. S.), 491.

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The Supreme Court of the United States, at its last term, in *Loan Company v. Topeka*, 20 Wall., 660, held that the power to contract a debt by issuing municipal bonds, or what is the same thing, municipal stock, carried with it, by necessary implication, the power to provide for the payment or redemption thereof by the levy and collection of a tax, unless the contrary expressly appeared. The language of the court is, that "it is to be inferred that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." To the same effect are *Madison County Court v. Alexander*, Walker (Miss.), 526; *Lowell v. City of Boston*, 111 Mass., 460; *Armstrong v. Perkins*, 43 Penna. St., 403, and *Armstrong v. Allegheny County*, 37 Penna. St., 290. In the last case the objection was, as in this, that there was no authority to levy a tax, but the court said, "The authority to create the debt implies an obligation to pay it, and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way—by levy and collection of taxes."

The city of Charleston has, by its charter, granted as early as 1783, "full power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of said city, as shall appear to them prudent." Art. IX, sec. 8, of the present Constitution of the State, adopted in 1868, provides that "the corporate authorities of . . . cities . . . may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under the authority of law." Chap. XIV, Revised Statutes, provides, "Sec. 1. That all municipal corporations created under or by the laws of this State, and vested with power to lay and collect taxes, are authorized and required to assess all property, real and personal, within their corporate limits, at its actual value, and lay all taxes thereon at a uniform and equal rate.

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Sec. 2. That all property, and no other, exempted from taxation by section 6 of chapter 12, shall be exempted from taxation by municipal corporations."

Thus it will be seen that there is no legislative limit upon the amount of money that may be raised by taxation in the city. Ample power is given to levy and collect all that may be necessary to discharge the corporate obligations. And as the General Assembly has provided that all property, except that exempted by law, shall be taxed at a uniform and equal rate for *all* purposes, the constitutional requirements of uniformity and the taxation of all property within the corporate limits for the payment of debts have been complied with. The new Constitution did not make additional legislation necessary to authorize a tax to pay a lawful debt. That power has existed since 1783. All it did require was, that provision should be made for placing the tax, when levied, uniformly and with equality upon all the property in the city. This has been done by the Revised Statutes.

We have, then, a case where the duty of the city to pay has been established by a judgment of this court, and where that duty can only be performed by the exercise of the power of taxation which the city possesses. Upon demand made the city has refused to make the payment, and has also refused to levy and collect the necessary tax. We are, therefore, called upon to determine whether this court has the power by its writ of mandamus to enforce the performance of this duty, and thus give effect to its judgment.

It is not denied that this power exists where the legislative authority to contract the debt is accompanied by a provision for the levy and collection of a *specific* tax for its payment. The Supreme Court of the United States has many times so decided. *Knox County v. Aspinwall*, 24 How., 376; *Van Hoffman v. Quincy*, 4 Wall., 535; *Benbow v. Iowa City*, 7 Wall., 313; *Riggs v. Johnson Co.*, 6 Wall., 166; *United States v. Keokuk*, 6 Wall., 514; *Supervisors v. Durant*, 9 Wall., 415; *Mayor v. Lord*, 9 Wall., 409.

The same court also held, in *Supervisors v. United States*, 4 Wall., 435, that the writ could issue in cases where the power to tax was not specially conferred by the act authorizing the contract,

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but by an independent statute subsequently passed, in the following words: "The board of supervisors, under township organization, in such counties as may be owing debts which the current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, not to exceed in any one year one per cent., upon the taxable property in any such county," to be collected and kept as a separate fund and expended in liquidation of such indebtedness. So, too, in *Galena v. Amy*, 5 Wall., 705, the writ was sustained, where the only specific authority for the tax was contained in the act incorporating the city, in force at the time the debt was contracted, and which provided that the city council *might, if they believed the public good and the best interests of the city required it*, levy and collect an annual tax, not exceeding one per cent. on a dollar, on the assessed value of all estate taxable in the city, in addition to all other taxes, the fund to be kept separate, and annually, on the first of January, paid over, *pro rata*, upon the funded indebtedness of the city. In all these cases particular taxes had been provided for to enable the corporate authorities to meet specific obligations. The taxes did not create the obligation. They only furnished the means by which it was to be met. The special provision for this levy and collection served to restrict, rather than enlarge, the corporate power of taxation for the payment of debts. As has been seen, the authority to contract a debt carries with it the power to provide the means of payment by taxation, if necessary. If the power to make a contract is accompanied by a provision for special taxation to meet its obligations when made, such taxation may, under some circumstances, exclude all other. But in the absence of any such restrictive provision, the general power of corporate taxation may, as a rule, be invoked.

In the present case there is no restriction. The obligation to pay exists, and the power to tax for its discharge is included in the general power to tax for all corporate purposes. There is no legal necessity for a separation of funds. All moneys necessary to meet all obligations may be collected by one general tax and placed in one common fund.

But while this power for a general levy exists there is no prohibition against more specific levies. The city is, in express

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terms, authorized to make any and all regulations it may deem "requisite and necessary for its security, welfare, and convenience," and there seems to be no good reason why, if deemed necessary by the corporate authorities, taxation may not be classified, and one fund raised for poor purposes, another for the support of schools, another to pay the expenses of the police, another for the payment of corporate debts, and so on to any extent that may be convenient or desirable. All this is left to the discretion of those who have, for the time being, the official control of the city government.

It is the special duty of the city to raise money by taxation and apply it, when raised, to the payment of this judgment. It is not a matter of any importance to this relator whether it is raised by general or specific tax, if it be in fact raised and applied. If, therefore, upon the rule to show cause in this case, the city had returned that it had included this judgment in its estimates for current taxation, and, in good faith, either had levied, or at the proper time would levy, a tax sufficient in the aggregate to meet this, with its other accruing and maturing obligations, such a return, if accompanied by assurances of a readiness and willingness to pay when the collection should be made, might have been accepted as showing sufficient cause why the writ asked for ought not now to issue. But this has not been done. On the contrary, the city, having refused to levy a tax in any form for the payment of the judgment, insists that it is not in the power of the court to compel it to do so. This presents the issue.

One of the offices of a writ of mandamus is to compel municipal corporations to perform their plain and positive duties. It may issue upon the application of one who has a clear right to require the performance of such a duty, if he has no other adequate remedy. There must exist both the right and the corresponding duty.

Here, as we have seen, the relator has the right to require the levy and collection of a tax to provide the means for the payment of his judgment, and it is the duty of the city to do what he requires. Unless it is done he is without remedy for the collection of his debt. Therefore, a writ may lawfully issue to enforce the right by requiring the performance of the duty.

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This gives the relator the right to a writ requiring a tax to be levied which shall include provision for the payment of his judgment. It only remains to consider whether he is entitled to have so much of the tax as is intended for his benefit separated from the general levy and set apart for his exclusive use. We cannot create new rights in favor of the relator, or confer new powers upon the city, but we can require the city to make use of any existing power it possesses adapted to the end to be accomplished. If it is not already in the power of the city to make a separate levy to pay this judgment we cannot require it to be done. But if it is we can. We have already shown, as we think, that the city has the power. Consequently it is proper that a writ should issue requiring the separation to be made, in order that we may enforce the further order we are asked to make directing the application of the money, when collected, to the payment of the judgment.

The prayer of the petition is granted.

Bond, Ct. J., concurred.

Circuit Court of the United States for the Eastern District of South Carolina.

FENNIMORE C. MARSH v. THE CITY COUNCIL OF CHARLESTON.

Where the charter of a bank makes each stockholder liable to twice the amount of his shares for its debts, and a judgment creditor sues at law a single shareholder who owns nearly all the shares, and it does not appear from the complaint that there are any other creditors besides the complainant, *Held*, on demurrer, that although the case might be different if there were more than this one creditor, yet, it not appearing that there were other creditors, the demurrer must be overruled.

THE facts of the case are sufficiently stated by the Chief Justice.

WAITE, C. J.—The plaintiff is a judgment creditor of the State Bank in the sum of \$40,127.25, and the defendant a stockholder to the amount of \$39,800. The charter of the bank pro-

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vides, that in case of the failure of the bank, each stockholder . . . shall be liable and held bound individually for any sum not exceeding twice the amount of his . . . share or shares." The bank has failed, and the plaintiff seeks in this action at law to charge the defendant, under this provision of the charter, with the payment of his judgment. It does not appear in the case as presented, that there are any other creditors of the bank or any other stockholders.

The defendant has demurred to the complaint, and, in support of his demurrer, contends that the individual liability of stockholders, as defined and created by this charter, cannot be enforced by one creditor for his own exclusive use to the injury of others.

If it anywhere appeared in the complaint, either by direct averment or fair legal inference, that there were other creditors of the bank, and that the assets, including the liabilities of the stockholders, were not sufficient to pay all in full, we should sustain the demurrer. In our opinion, it was not the intention of the legislature, by this provision, to create a liability to the separate creditors, which one could enforce to the injury of another. The undertaking assumed by the stockholders is not to pay debts, but to such sums, not exceeding the amounts of their respective shares, as should be necessary under the circumstances. Undoubtedly the object was to furnish the creditors with additional security, and to have the payments, when made, applied to the discharge of the debts. The obligation, too, is one that may be enforced by the creditors, but as it is to or for all the creditors, and not any one alone, it must, as we think, be enforced by or for all. The form of action employed, therefore, should be one adapted to the protection of all.

As it does not now appear that there is any creditor of the bank except the one who sues, we cannot say that this form of action is not adapted to the circumstances of this case. The demurrer is therefore overruled, with leave to the defendant to avail himself of his proposed defence by answer.

Bond, Ct. J., concurred.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, May, 1876.*

**FREDERICK J. BANG v. FARMVILLE INSURANCE & BANKING
COMPANY.**

Although a policy of insurance provides in terms that the insurance company shall not be liable until the premium shall be actually paid, and that no such provision shall be construed as waived, except by some act as distinct as a clear, express agreement indorsed on the policy,

Held, that where insurance brokers, on delivery to them of a policy, were charged, in general account, with their knowledge, with the premium due on the policy, and they made no objection, the company was liable for the insurance money.

THE facts of the case are sufficiently stated by the Chief Justice.

WAITE, C. J.—Woodward & Sherwood were the agents of the defendant at Jersey City, with authority “to take fire risks, fix rates of premium, receive moneys, countersign, issue, renew, and grant leave to transfer policies of insurance signed by the president and secretary of the company, and to transact the business of insurance in accordance with the rules and regulations of the company, and such instructions as might from time to time be given them by the officers thereof.”

The plaintiff employed a firm of insurance brokers in New York to place a large amount of insurance for him upon his “frame building, known as Congress Hall, . . . in the village of Sharon Spa, N. Y.” These brokers placed one thousand dollars with the defendant, and received from Woodward & Sherwood, as its agents, a policy for that amount, dated June 2d, 1875. The policy did not acknowledge the receipt of the premium, and contained conditions as follows :

“This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid.”

“The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy,

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shall not be construed as a waiver of any printed or written condition or restriction therein."

"The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

When the policy was delivered to the brokers, they were charged on the books of Woodward & Sherwood with the amount of the premium, less their commission of fifteen per cent. as brokers, and they credited that firm with the same amount on their own books. Woodward & Sherwood also at the same time credited the company with the premium.

Soon after receiving the policy the brokers delivered it to Bang, charging him on their books with the premium. It is the custom of insurance agents to transact their business with brokers in good credit in this way. This practice had prevailed between Woodward & Sherwood and this firm of brokers for more than a year previous to this transaction. Statements were rendered the brokers monthly, showing each premium unpaid. As payments were from time to time made, they were so entered on the books as to show the particular premium they were intended to meet.

Monthly statements were also made by Woodward & Sherwood to the company, showing the risks taken and the premiums collected, as well as those uncollected. Remittances were made in such manner as to indicate the particular premiums paid. The agents were charged on the books of the company with the premiums upon all risks taken. Whenever a policy was cancelled for non-payment of premium, as was sometimes done, the charge against the agents for the premium on that policy was balanced by a corresponding credit. The company had ample means of ascertaining from month to month what premiums were paid upon the outstanding risks and what were unpaid. It also appears from the testimony of the president of the company that the general course of business between the agents and the brokers, as well as their customers, was understood at the home office, and no objection was ever made.

In August, Bang paid his brokers on account \$450, and this

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amount was placed to his credit without applying it to the discharge of any particular premium. This was sufficient to pay in full all premiums on all the policies obtained up to and including that of the defendant, but left a considerable sum due on the general account, which included premiums upon a large number of policies obtained after that had been issued. The premium on the defendant's policy was never paid by the brokers to Woodward & Sherwood, and they reported it to the company in all their monthly reports as unpaid and the risk uncanceled. Several times during the summer Woodward & Sherwood called the attention of the brokers to the fact that there had been unusual delay in the payment, and intimated that, unless it was soon provided for, they would be compelled to give notice of a cancellation of the policy on that account. The brokers recognized the fact of the delay, and promised to give it attention at once, but no steps were taken to cancel the policy, neither was the charge for the premium marked off in any of the accounts.

Things remained in this condition until September 1st, 1875, when the property insured was destroyed by fire. Within a few days after, the brokers tendered the premium to Woodward & Sherwood, but they, under instructions from the company, refused to accept it.

The share of the loss payable by the defendant, and which is not disputed, if any liability exists, is \$763.13.

Some questions were raised upon the trial as to notice and proofs of loss, but the testimony shows clearly that prompt notice was given immediately after the fire, and that as soon as the adjustment was completed proofs were furnished showing the amount of the entire loss, the amount of the whole insurance, and the percentage to be paid upon each policy. Copies of the written portions of the several policies other than that of the defendant were not given, but no objection was made at the time on that account, the company rejecting the claim on the sole ground that the premium had not been paid. It is now too late to make this objection. *Blake v. The Exchange Mutual Insurance Company*, 12 Gray, 265.

It was also objected at the trial that there was such overvalu-

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ation of the property for the purposes of insurance as rendered the policy void. The proof fails to sustain this defence.

The only other question presented by the pleadings or upon the trial is as to the effect of the non-payment of the premium upon the liability of the defendant. There is no doubt that Woodward & Sherwood had power to give credit upon the premium, and to waive that condition of the policy which required its payment before the liability of the company should attach. This was not denied at the trial. They were the agents of the defendant to transact generally its business of insurance at Jersey City, in accordance with the rules and regulations of the company, and these rules and regulations, it is agreed, provided for credit by special arrangement. Neither can there be any doubt that there was a waiver of the advance payment in this case, if it could be done in any other manner than by an express agreement to that effect indorsed upon the policy. This case is not materially different from that of *Miller v. Insurance Company*, 12 Wail., 303, in which it was said that "where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended, that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment."

The real question then, is, whether this case falls within the provision of the policy which is relied upon. The language is not that there can be no waiver unless an indorsement to that effect is made upon the policy, but that "the use of general terms, or anything less than a distinct and specific agreement, clearly expressed and indorsed on the policy, shall not be construed," etc. This is no more than providing that nothing shall be construed as a waiver that is less distinct or specific than an agreement clearly expressed and indorsed on the policy would be.

Here the acts are clear, distinct, and specific, and the intention of the parties is unmistakable. The policy was delivered, and simultaneously with the delivery the brokers, with their consent,

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were charged in general account for the premium. The case is in effect as it would have been if, upon the delivery of the policy, the agents had accepted the note of the brokers for the amount of the premium payable on demand. A charge in account on book, with the consent of the party charged, is equivalent to an agreement by him to pay on demand the amount charged. We can hardly believe it will be seriously contended that if these brokers had in fact given their due-bill for the premium when the policy was delivered, an indorsement to that effect on the policy would be necessary to charge the company with liability.

In our opinion the charge on book, under the circumstances, made as it was in the usual course of business according to the custom of the trade, and known and assented to by the officers of the company, is to be treated as the equivalent of payment, and not as the waiver of the condition only. Certainly the acceptance of a note for the amount would have been such an equivalent, and we can see no difference in principle between that case and this. The brokers would be as much liable for the payment of the premium in the one case as in the other.

If by any chance the premium could not be collected, ample protection was furnished the company against a continuance of the risk by that clause in the policy which authorizes its termination at the option of the company, on giving notice to that effect. This seems to have been relied upon by the agents as a means of protection against loss, under the practice which prevailed of delivering policies in advance of the payment of premiums, for it is proven to have been a part of the custom to cancel the policies upon notice if payment was not made within a reasonable time.

Let judgment be entered in favor of the plaintiff for	.	.	.	\$763 18
Less charges for premium and policy unpaid,	.	.	.	33 50

\$729 68

And interest from December 17th, 1875.

United States Circuit Court, District of Maryland, at Baltimore.

WILSON SEWING MACHINE CO. v. ISABELLA JACKSON,
EXECUTRIX OF SAMUEL JACKSON, DECEASED.

Section 864 U. S. Rev. Stat. is in derogation of the common law, and therefore its provisions must be strictly complied with in taking depositions *de bene esse* under it; the witness must be "carefully examined," and must be sworn to testify the "whole truth" on the entire subject-matter of the depositions, and not merely the whole truth in response to each of several interrogatories propounded to him.

As to the mode of administering the oath, it is sufficient in that respect to follow the directions of the statute law of the State of the United States where the depositions were taken.

THE facts of the case were sufficiently set forth in the following decision of the court, delivered by

BOND, J.—At the trial of this cause the plaintiff, in support of its claim, offered to read to the jury the deposition of the president, one Wilson, taken *de bene esse*. The defendant objected on the ground that the statute (U. S. Revised Statutes, section 864) had not been complied with, the deponent not having been properly cautioned and sworn, and the court sustained the objection, and refused to allow the deposition to be read. The verdict being for the defendant, the plaintiff makes this its motion for a new trial. It appears from the certificate of the notary who took the deposition, that in pursuance of the notice given he attended at the time and place appointed, and that William G. Wilson, a witness of lawful age, produced on the part of plaintiff, "being by me first duly sworn on interrogatories propounded to him, testified" as is set forth. Originally there followed after the word sworn the words, "on the Holy Evangelists of Almighty God," but on cross-examination the witness stated he had not been so sworn, and the notary struck those words out of his certificate. At the close of the deposition the notary certifies that William G. Wilson "was by me first sworn to tell the truth, the whole truth, and nothing but the truth" touching the interroga-

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tories propounded to him, and at the close of his certificate he certifies that the said Wilson "was by me sworn on the Holy Evangels of Almighty God." The statute of Illinois, the place where this deposition was taken, provides (Revised Statutes, 1874, chap. 101): "It shall be lawful for any person empowered to administer an oath to administer it in the following form. The person swearing shall with his hand uplifted swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospels." The Supreme Court of the United States has determined that the act of Congress now expressed in Section 864 of the U. S. Revised Statutes is in derogation of the common law, and must be strictly construed and complied with. It requires that the party about to testify shall be cautioned and sworn to tell the whole truth, and be carefully examined. The first certificate of the notary is that he was duly sworn, and it is to be supposed from that statement that the witness was legally sworn; that is, that he took the oath prescribed by the statute of Illinois. But that is not sufficient. It must be certified in the form prescribed by the statute that witness was sworn to tell the whole truth; not merely that he should true answers make to the interrogatories propounded to him. But the second certificate of the notary is that the witness was first sworn to tell the truth, the whole truth, and nothing but the truth touching the interrogatories propounded to him. What the witness should have been sworn to do in this *ex parte* proceeding was to tell the whole truth as far as he knew it respecting the matter in controversy between the plaintiff and defendant. He might well have told the truth in answer to all questions propounded to him, and then have suppressed facts within his knowledge about which he was not interrogated, and yet those facts might have been of infinite importance to the defendant. But laying this aside, how was the witness sworn on this occasion? The notary further certifies that he was sworn on the Holy Evangels of Almighty God; the witness says he was not. If there be a statutory form of oath in the place where the witness is examined, that is the form to be used upon an examination under Section 864 of Revised Statutes of the United States, unless the deponent expresses conscientious scruples respecting that form. If he expresses such conscientious

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scruples the oath which he regards as binding upon his conscience must be administered to him, and the commissioner or other examining officers must certify the reason which caused him to vary from the customary or statutory form of oath. But in this instance the notary certifies first, that he duly swore the witness; that is, according to the customary or statutory form; and then he certifies that he swore him according to another form, without alleging any conscientious objection to the statutory form on the part of the witness, and the witness states in his examination that he was not sworn on the Holy Evangelists of Almighty God, as the notary certifies he was sworn. The notary had no authority to vary the customary form of oath unless the witness had conscientious scruples respecting that form, and we suppose he did so vary it because of the witness's scruples. If he did so do, the witness declares he was not sworn at all, and even if he were, the notary does not certify that under the form the witness was sworn to tell the whole truth.

There are other reasons filed for a new trial, but they all depend upon the disposition of this question respecting the admissibility of this deposition; except perhaps one, and that the verdict must stand. This motion is denied.

William Daniel, A. Stirling, Jr., for plaintiff.
O. F. Bump, T. M. Lanahan for defendant.

*United States Circuit Court, Western District of Virginia, at
Lynchburg, March, 1877.*

N. M. PAGE, EXECUTOR, ETC., v. J. H. RIVES, COLLECTOR,
ETC.

Where sums of money are received by claimants under a deceased person's will, under a compromise contract made by them with the executor of the will, sanctioned by a court having jurisdiction of the will and of the estate devised,

Statement of the case.

Held, that the sums of money so received do not fall within the category of "legacies" or "distributive shares" in intestates' estates, which are subjected to an internal revenue tax by the United States.

THIS was an action of assumpsit, and was first brought in the State Circuit Court of Lynchburg. It was removed thence by *certiorari* to the Circuit Court of the United States, sitting at Lynchburg. It was brought for the recovery of a tax illegally assessed against the plaintiff by the defendant as United States Collector of Internal Revenue, and paid by the plaintiff under protest.

The plaintiff was assessed by the United States Assessor of the Fifth Virginia District, on the 22d day of October, 1874, with an internal revenue tax of \$18,000, being six per cent. on \$300,000 paid to Robert W. Davidson, James Davidson, John Davidson, Samuel M. Davidson, and Bennett M. Davidson, the illegitimate children of his testator, Samuel Miller, by Mary D. Davidson, in pursuance of a compromise made with them by those representing the charity school established by the twenty-fifth clause of the will of his testator, which tax the plaintiff paid to the defendant, on the 10th day of November, 1874, under protest in writing. See *infra*, pages 304 and 305, for this clause.

The plaintiff was also assessed at the same time, by the same assessor, with an internal revenue tax of \$2000, being four per cent. on the sum of \$50,000 paid to Jesse Miller, in pursuance of a compromise made with him by the same parties, which tax the plaintiff paid to the defendant, on the 10th day of November, 1874, under protest in writing. Both taxes were paid to avoid distraint or other forcible process to collect the same.

January 11th, 1875, the plaintiff duly made claim upon the Commissioners of Internal Revenue, for the refunding of said taxes, for the reason that the sum of \$300,000 and the sum of \$50,000, on which said assessments were made, were not, nor was either of them, nor any part of either, paid to said parties, or either of them, as a legacy under the will of Samuel Miller, deceased, nor was it paid to them, or either of them, as a distributive share in his estate under the intestate laws of Virginia, and demanding to have the said sums of \$18,000 and \$2000 refunded to him.

Statement of the case.

March 10th, 1875, the Commissioner of Internal Revenue, after holding it under advisement, rejected said appeal for the reason "that the taxes were due and legally assessed and collected."

Before either assessment was made, the plaintiff informed the collector, who reported the assessments, that in his opinion the tax was illegal, and that there was no authority in law to collect it, and filed with him a protest in writing, insisting on their illegality, and before the assessments were made he filed with the Commissioner of Internal Revenue a protest in writing insisting on their illegality and assigning the reasons therefor.

In March, 1869, Samuel Miller, a resident of the county of Campbell, Virginia, died, leaving a will dated in April, 1859, which was duly admitted to probate. He was never married, and left no lawful issue. But the five above-named Davidsons were recognized by him as his illegitimate children. Soon after the probate of said will, a suit was instituted by said Jesse Miller against the executor of Samuel Miller and others, in the Circuit Court for the city of Richmond, under the style of *Jesse Miller v. N. M. Page, Executor of Samuel Miller, and others*, alleging that said twenty-fifth clause of the will was invalid, and that the whole subject embraced in that clause had vested in him. The said Jesse Miller proved in said cause that he was sole heir at law and next of kin of said testator. A compromise was effected with said Jesse Miller by which he agreed to accept \$50,000 in full of his said claim, and to assign and transfer to the Board of the Literary Fund for the benefit of the same parties and upon the same trust mentioned and declared in the twenty-fifth clause of said will, all right, title, interest, and claim whatsoever, which he has or may have as heir at law or next of kin of said Samuel Miller, whether now existing or hereafter to arise, and whether capable of being asserted in said suit or otherwise. This compromise was approved by the court, and was carried into effect by proper decrees entered in said cause, and Jesse Miller being paid said sum out of the residuum bequeathed as aforesaid to said charity school, executed and delivered a deed for the benefit of the said school as provided by said compromise, and said suit was then dismissed.

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The plaintiff in this suit then filed a bill in said court asking it to advise and direct him in the administration of said estate. All persons interested were made parties, and among them the said illegitimate children of the testator. After said suit was matured and set for hearing, the said illegitimate children filed a cross-bill, charging that the said twenty-fifth clause of the will was invalid. But if valid, that the contingency had happened by which the said school was defeated and prevented from being carried out, and that the whole subject devised for the purpose had vesture in them under the limitation in their favor.

Proper answers were filed to the cross-bill, and among them an answer on behalf of said school, denying that the contingency had happened by which the establishment of said school had been defeated and prevented, and insisting that said clause was valid, and claiming the bequest on behalf of said school. The causes on the original and cross-bills were regularly matured as to all parties, and being heard, the court decided that said clause was not valid under chapter 80 of the Code of 1860, but was valid by reason of the authority given to the executor to petition the legislature for the passage of any law which might be necessary more effectually to carry out the object of the testator in the establishment of said school; and that it was an executory devise contingent upon the passage of such a law, and directed the executor to apply to the legislature to procure its passage.

From this decision an appeal was taken on behalf of the school, and afterwards by the executor, to the Supreme Court of the State. Whilst these appeals were pending, and when they were about to be heard, certain persons residing in Kentucky filed their bill in the said Circuit Court against the plaintiff in this suit and others, alleging that they were heirs at law and next of kin of Samuel Miller, that said twenty-fifth clause was invalid, and that they were entitled to the whole subject bequeathed by that clause. This cause was regularly matured as to all parties, and heard, when the court decreed that said twenty-fifth clause was valid against the heirs of Samuel Miller, and dismissed their bills. From this decision they appealed to the Supreme Court of Appeals, where the case was docketed under the style of *Kinnaird, etc., v. Miller's Executor et als.*

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About this time a proposition was made on the part of these illegitimate children for a conference, with a view to a compromise. After a protracted negotiation, a plan of compromise was agreed on between those representing the school and the said illegitimate children. It was agreed that the school should pay said children the sum of \$300,000, and release to them the reversions in the special bequest to the said children to which the school was entitled in the event if either of them should die without issue; and this was to be accepted and received by said children "in full satisfaction of all right, title, interest, and claim whatsoever, which they or either of them have, or may be entitled to, under the said twenty-fifth clause, whether now existing or at any time or times hereafter to arise in any manner or upon any contingency whatsoever." As some of these children were infants, it was deemed advisable to submit the compromise to the said Circuit Court for approval.

It was accordingly stipulated that the plan of compromise should be submitted to the court, and if approved and ratified by the court, then a petition was to be presented to the legislature, in which the said children were to unite with the executor for an act of incorporation to establish said school upon a safe and permanent footing, according to the scheme of said twenty-fifth clause, and to authorize the execution of a deed releasing said reversions, and authorizing a conveyance by said children to and for the charitable uses and purposes prescribed by the twenty-fifth clause of said will, of all their said rights, claims and interests now existing, or hereafter in any manner or upon any contingency to arise or accrue in and to the subject bequeathed by said twenty-fifth clause. The compromise was dated 11th of February, 1874, and the decree ratifying it was entered the 13th of February, 1874.

These successive steps were taken to give effect to said plan of compromise, and after it was signed by all the parties it was submitted to the court, and by it was ratified and approved by a proper decree to carry out its several covenants and stipulations. After this was done, the executor presented to the legislature a petition, in which the said children united, praying for an act of

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incorporation for said school, and for authority for all parties to execute the necessary deeds required by the plan of compromise. A copy of the plan of compromise and of said decree accompanied the petition. The prayer of the petition was granted, and the legislature passed an act to give effect to the compromise and to establish said school according to the scheme prescribed by the testator in said clause of his will. It conferred the power to execute the necessary deeds to carry out the compromise, and granted a charter of incorporation to the school by the name and style of the "Miller Manual Labor School of Albemarle." The school was thus placed on a permanent and enduring basis, and the legislature thus surrendered the power over the school which it could exercise under the 8th section of chapter 80 of the code, and the corporation thus chartered became entitled to take and hold the legacy bequeathed by the twenty-fifth clause of said will for the uses and purposes of said school as declared therein.

After the passage of this act of incorporation, the appeal of the Kentucky heirs was argued in the Supreme Court of the State, and it decided that the said twenty-fifth clause was valid against the heirs at law of Samuel Miller, and affirmed the decree of the Circuit Court dismissing their bill. Immediately after this decision was entered, the two appeals taken to the decision of the Circuit Court in the case of the cross-bill filed by said illegitimate children, were dismissed by an order entered by the appellate court. The dismissal of these two appeals affirmed the decree of the Circuit Court, which decree dismissed the cross-bill of the Davidsons, and decided that the said school was entitled to the whole legacy bequeathed by the twenty-fifth clause as an executory devise.

By the third clause in the plan of compromise, these children were not entitled to this sum of \$300,000 until after these several steps were performed, to wit, the act of incorporation was to be procured, the deeds in pursuance of it made, the decision of the Supreme Court of Virginia, that the twenty-fifth clause was valid against the heirs at law of Samuel Miller, rendered, and the two appeals dismissed, and "thereupon the said sum of \$300,000 shall be paid to the Davidsons." These several conditions were per-

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formed, and then the time arrived to pay the said sum to said children, and then the Board of Education, which by the charter holds the stocks and bonds constituting this legacy, requested the judge of the County Court of Albemarle to select the stocks and securities to raise said sum, looking to the best interest of the school in making the selection.

This was done by him, and the said sum of \$300,000 was paid by the executor to these illegitimate children under and pursuant to the decrees in these cases, and all the deeds required by the plan of compromise and the act of the legislature have been duly executed and delivered, and properly recorded.

Samuel Miller in his lifetime treated these Davidsons as his children. They were born and reared on his farm within a short distance of his dwelling. He maintained and educated them. He gave one of them \$10,000 in his lifetime. To two others he gave a valuable farm. He consulted Dr. Terrell about the provision he should make for them in his will, and by his will gave each of them about \$35,000, with this limitation over in the twenty-fifth clause by which he gave them, in a certain contingency, the whole subject bequeathed in that clause. He gave to their mother, Mary D. Davidson, \$15,000 in his lifetime, and a like sum by his will.

The sum agreed to be paid Jesse Miller has been paid, and there is nothing in the hands of the executor belonging to him. He has never claimed as legatee under the twenty-fifth clause. In his bill he claimed that that clause was invalid under the laws, that as to the subject thereby bequeathed Samuel Miller died intestate, and that he was entitled to it as heir at law and next of kin.

Ex-Judges W. J. Robertson and John A. Meredith and Mr. Craighill, counsel for the executor.

Mr. Warren S. Lurty, counsel for the United States.

The counsel for the executor contended that the subject taxed must be either "a distributive share in an intestate's estate," or "a legacy," under the will of Miller; that the sum of \$50,000 paid to Jesse Miller was paid as a compromise; that he never

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claimed a "legacy" under the twenty-fifth clause of the will, but insisted that that clause was void, and that he was entitled to the whole subject bequeathed as heir at law and next of kin, and that as there was no such legacy, the tax on the \$50,000 was not a tax on a "legacy," and was therefore illegally imposed.

They further contended that the \$50,000 paid to Jesse Miller was not a "distributive share" in the estate of the testator, because the Court of Appeals, in the case of *Kinnaird v. Miller's Executor*, 25 Gratt., 107, decided that the twenty-fifth clause was valid against the heir and next of kin, and that he died intestate, and therefore that the \$50,000 was not paid to Jesse Miller either as a "legacy" or as a "distributive share," and the tax imposed thereon was illegal and should be refunded.

The counsel for the executor further insisted that the tax on the \$300,000 paid the Davidsons was illegal. This sum was paid them as a compromise. They had instituted a suit claiming that the contingency, mentioned in the twenty-fifth clause of the will, by which the subject bequeathed in that clause was limited over to them, had happened, and that they were entitled to it. The twenty-fifth clause of the will, after establishing the charity school, and bequeathing to it the property therein specified, contained this clause under which the Davidsons claimed :

"Should the legislature of this commonwealth pass any act or law which will defeat or prevent the carrying out of the objects or purposes of this clause, as hereinbefore declared and set forth, then, and in that event, I do hereby give, devise, and bequeath the trust fund created by that clause, or so much thereof as may remain unappropriated, to the children of Mary D. Davidson (hereinbefore named) and their heirs forever."

It was contended by the counsel for the executor that the estate taken by the Davidsons was an executory devise; being a fee limited upon a fee, it can only take effect as an executory devise. *Fearne*, 503; 3 *Lomax Dig.*, 280-1. That the limitation in favor of the Davidsons was void for remoteness. To constitute a good executory devise, the contingency must happen in a reasonable time, and that has always been held to be a life or lives in living, and twenty-one years afterwards. The rule goes further and holds that it is "not sufficient that the limitation be

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capable of taking effect within the prescribed period, it must be so framed as *ex necessitate* to take effect, if at all, within that time." 4 Vesey, 227; 3 Gray, 152; 2 Rob. Rep., 424.

The devise by the twenty-fifth clause to the Board of the Literary Fund for the school is valid, under ch. 80 of the Virginia Code of 1860. That the board took a vested legal title, and that the legislature cannot divest the title, except when the will is made and takes effect under that chapter. The legislature reserves the right, under the 8th section of that chapter, "to repeal or suspend the authority thereby given" to make a will "*at any time*," and thus pass a "law that will defeat or prevent the carrying out of the objects and purposes of this clause." By the express terms of this chapter the legislature may pass such a law "*at any time*," however remote. There is no limit in point of time within which the legislature may exercise this reserved right to pass a law that will "defeat or prevent" this clause. It is indefinite as to time. It may pass such a law a thousand years after the school has been in operation; and as the limitation in favor of the Davidsons is on the passage of such a law by the legislature, it is too remote, and therefore void. It is a limitation to take effect beyond the period prescribed by the rule against perpetuities within which an executory devise must vest.

The counsel for the executor further contended that if the devise to the Board of the Literary Fund for the school did not take effect under chapter 80 of the code, then it was good as an executory devise under that passage in the twenty-fifth clause of the will, which directs that

"My executors are authorized and directed to petition the legislature of Virginia for the passage of *any laws* which may be requisite for more effectually carrying out the objects and purposes of this clause in regard to the school therein mentioned."

Under this passage the devise to the board for the school is good as an executory devise, if not good under ch. 80, being limited on the passage of "any laws that may be requisite for more effectually carrying out the objects and purposes of the clause in regard to the school." *Inglis v. Sailors' Snug Harbor*, 3 Peters; *Dawson v. Literary Fund*, 10 Leigh. If this be so, then the estate of the Davidsons is an executory devise limited

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on a prior executory devise, and is therefore too remote and void, for whilst it is true that on every estate conferred by an executory devise another executory devise may be limited, yet it is equally well settled that, whenever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be taken to be executory devises. As, then, the devise to the Davidsons is limited on a prior executory devise, which has the full period allowed by the rule against perpetuities, within which the contingency may happen, and the prior devise vest, it necessarily follows that a limitation which cannot vest until after that period is too remote. A life or lives in being at the death of the testator, and twenty-one years after, is the period allowed by this rule of law for the happening of the contingency on which the devise for the school is limited. This is the full period allowed by law to cover all limitations. Any limitation to happen beyond that is too remote. Now the devise to the school, if it be an executory devise, has the whole of this period within which the estate may vest. If the contingency happens at the last moment of time within that period it is good; and as the limitation to the Davidsons must happen after that period, it is too remote and void. So far from the devise to the Davidsons being so framed that it must *ex necessitate* take effect within that time, it is so framed that it must *ex necessitate* take effect beyond that time, and is therefore too remote and void.

In no view, then, are the Davidsons entitled to any legacy under this clause of the will, and the \$300,000 paid them, not being paid as a "legacy," it is not liable to taxation. Nor was it paid to them as a "distributive share," because, being illegitimate children, they would be entitled to no interest in the estate of Samuel Miller if he had died intestate. But in fact he died testate, as the Court of Appeals decided in *Kinnaird v. Miller's Executor*.

For these reasons the sum of \$50,000 paid to Jesse Miller, and the sum of \$300,000 paid to the Davidsons, were not paid either as a "distributive share" or as a "legacy," and hence the tax imposed on these two sums, and paid by the executor, was illegally assessed and collected, and should be refunded, and we ask a judgment for the sum of \$20,000 so paid by the executor.

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BOND, J., accepted the view of the law presented by the counsel for the executor, and judgment was given against the collector.

Circuit Court of the United States, District of Maryland, at Baltimore, April term, 1877.

GEORGE E. BOWDEN, RECEIVER OF FIRST NATIONAL BANK OF NORFOLK, v. THE FARMERS' AND MERCHANTS' BANK OF BALTIMORE.

Under the provisions of the National Bankruptcy Act, the transferee of shares of the capital stock of a National bank, under a transfer made absolute and in due form on the books of the bank, is liable to creditors of the bank as a stockholder, notwithstanding the transfer was in fact made as collateral security for the payment of a debt, which has since been paid, the shares still standing on the books of the bank in the name of the transferee at the time of the suspension of the bank.

THIS was an action of trespass on the case in assumpsit, the facts being as follows:

The First National Bank of Norfolk, duly organized under the provisions of the National Banking Act, having suspended on the 26th day of May, 1874, the plaintiff, on the 3d day of June in that year, was duly appointed by the Comptroller of the Currency, a receiver to take charge of and to wind up the affairs of the bank. In the month of August, 1875, the plaintiff was directed by the comptroller to enforce the whole of the personal liability of those owning the stock of the bank at the date of its suspension. In the month of February, 1872, one Burwell, who was the owner of twenty shares of the capital stock of the bank, transferred the same absolutely and in due form on the books of the bank to the defendant bank as collateral security for the payment of a debt due by Burwell, to the latter bank. In the month of August, 1872, the debt due by Burwell being dis-

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charged, the defendant bank returned to him the shares assigned, with power of attorney to retransfer the shares on the books of the Norfolk bank. The retransfer, however, was not made, and the shares continued to stand in the name of the defendant bank until the suspension of the Norfolk bank, in May, 1874. In pursuance of the instructions of the comptroller demand was made by the plaintiff on the defendant for payment of the par value of the said twenty shares of stock, which was refused; and thereupon this suit was brought to recover of the defendant the par value of said shares.

L. L. Lewis, A. Sterling, Jr., and George H. Chandler, for the plaintiff, relied on *Rosevelt v. Brown*, 1 Kernan, 148; *Hale v. Walker*, 31 Iowa, 344.

Charles Marshall, Esq., for the defendant.

In this case a jury trial was waived, and it was tried before the court, in pursuance of the provisions of section 649 of the Revised Statutes of the United States.

GILES, J.—The facts as proved before the court were as follows: The First National Bank of Norfolk was a bank duly organized under the National Bank Act of 1863 and 1864; that by the stock ledger of said bank a certain Burwell held twenty shares of the capital stock of the said bank, of the par value of \$100 each; that he subsequently borrowed money of the defendant to this suit, and to secure the payment of the same, transferred to the defendant his twenty shares of the capital stock of the said First National Bank of Norfolk, which transfer was made on the books of said bank by a surrender of his certificate, and a new certificate issued to the said defendant; that said defendant, when said loan was paid, returned said certificate of stock to said Burwell, with a power of attorney indorsed on the back of the same, authorizing him to retransfer the said twenty shares to himself, but this was never done; but the said stock continued to stand in the name of this defendant up to the time of the closing of the said First National Bank of Norfolk, without anything on the face of the books of said bank to show that

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the defendant held the said twenty shares over as security for a loan, and not as the legal owner of the same; that subsequently, to wit, on June 3d, 1874, the Comptroller of the Currency, in pursuance of the power and authority vested in him by the said act of Congress, closed the said bank and appointed the plaintiff receiver of the same; and on the 13th day of August, 1875, the said comptroller determined that, in order to discharge the legal debts and liabilities of the said bank, "it was necessary to enforce the individual liability of the stockholders, as provided for by the 12th section of the act of Congress of 3d June, 1864," and he directed the said plaintiff, as receiver, to institute such legal proceedings as might be necessary to enforce against the stockholders of said bank their liabilities under said acts; in pursuance of which direction and authority this suit was brought.

The counsel for the defendant has contended that it is not responsible, upon the grounds, *first*, because it held the said twenty shares of the capital stock of the said Norfolk bank only as a security for a loan made to its real owner; and, *secondly*, because, before the closing of the said bank, the loan had been paid to the defendant, and it had delivered to the borrower the certificate of the said stock with power of attorney on the back thereof to retransfer it to him.

The court does not consider either of these reasons sufficient to prevent a recovery of the amount claimed in this suit. By the 12th section of the act of 1864, it is provided, "that every one becoming a shareholder by such transfer shall in proportion to his shares, succeed to all the rights *and liabilities* of the prior holder of said shares," and by the said section it is also provided that the shares shall be transferable on the books of the bank. Now, it was the duty of the defendant, having taken an assignment on the books of the said bank of the twenty shares, when its loan was repaid to it, to have seen that these shares were transferred back to the said Burwell on the said books, and having failed to do so before the said bank was closed by the comptroller, the receiver was authorized to regard it as the legal owner of these shares.

I therefore give judgment in this case for the sum of two thousand dollars with the costs of this suit.

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*United States Circuit Court, District of Maryland, at Baltimore,
November, 1866.*

THE JACKSON INSURANCE COMPANY, OF TENNESSEE, v. JAMES
A. STEWART, OF MARYLAND.

A declaration of war by competent authority puts an end to all rights of action as between the citizens of the respective belligerent powers, from its date to the conclusion of peace ; suspends the running of the statute of limitations, and also the running of interest upon debts between citizens of the respective belligerents.

THIS was an action on a bill of exchange, drawn in Memphis, in February, 1861, at sixty days, on James A. Stewart, payable at the Farmers' and Planters' Bank, in Baltimore, and accepted by Stewart, but protested for non-payment, April 26th, 1861.

Plea : Statute of Limitations.

Replications : 1st. That war existed when the cause of action accrued, and that three years had not elapsed between the close of the war and the commencement of the suit.

2d. That the President of the United States declared war against Tennessee, by his proclamation of August 16th, 1861, which was continued until, by the proclamation of the President of June 13th, 1865, Tennessee was restored to the Union ; and that the intervals of time which elapsed from the maturity of the bill to the beginning of the war, and from the close of the war to the commencement of this suit, did not together amount to three years.

To these replications a general demurrer was filed by defendant.

After full argument, the court decided as follows :

GILES, J.—Unquestionably in this case *lex foci* prevails, and not *lex loci contractus* ; hence the court will apply the law of Maryland, which requires suit to be brought within three years. 1 Maryland Code, article 57, sections 1 and 2.

In this law there are certain specified exceptions provided for,

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but it is a mistake to suppose that exceptions may not arise other than those mentioned in the statute. The law always supposes the existence of a party in being capable of suing; and if, when the cause of action occurs, there is no such party capable of suing, limitations do not begin to run until such a party comes into being. Hence, if war had existed at the time this cause of action accrued, limitations would not have begun to run against plaintiff's claim until the war ended.

On the 7th of September, 1861, this court decided that the President of the United States had the right, by proclamation, to recognize the existence of a state of war, and that the war, from and after the date of such proclamation, existed between the States mentioned in the proclamation and the rest of the United States; also that the late war, when so declared and recognized by the President's proclamation, became a civil war, and imposed upon both belligerents all the rights and consequences of such a war. This was one of the earliest decisions in regard to our late civil war, and the principles there enunciated have since been fully confirmed by the Supreme Court in the Prize Cases, 2 Black, 635.

The justices of that court were unanimous as to all the consequences which resulted from a state of civil war, but the three dissenting judges were of the opinion that the war began only after the proclamation of the President of August 16th, 1861, passed in pursuance of power conferred upon him by the act of July 13th, 1861.

As regards the State of Tennessee, there can be no doubt that war existed in consequence of the proclamation of the President of August 16th, 1861, and not before, as that State was not included in the previous proclamations.

It is a well-settled principle, that contracts made before war are only *suspended* by the war, whereas, contracts made during the war, are *void*. This principle is fully recognized by the Supreme Court in regard to our late civil war.

In ancient times private property of alien enemies, and debts of every kind were confiscated to the State. Happily, all this has been changed in modern times; and now, while contracts made during war between alien enemies are absolutely void,

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being against public policy, private interests are protected, and *bona fide* contracts made before the breaking out of the war are suspended during its continuance, but revive at its termination. To the honor of the United States and Great Britain be it said, that these rights have always been respected by them.

It has been repeatedly decided by both State and Federal courts, that where, by a legislative enactment, parties are prevented from prosecuting their claims, the interval during which such prevention lasts is not to be counted as part of the time allowed by the statute of limitations. Now, the power to make war and peace is by the Constitution of the United States delegated exclusively to the Federal government; and as during the war, the plaintiff, being a corporation of the State of Tennessee, had no right to bring suit against the defendant, who was a citizen of Maryland, the Maryland statute of limitations was suspended during such period.

The general rule unquestionably is, that where the statute of limitations has once begun to run, no subsequent disability will arrest it.

But we have already seen that a legislative enactment suspends the running of the statute, and the same result follows from the declaration of war by the supreme power of the land. For it is a well-recognized principle of the law of nations that the right of a creditor to sue for the recovery of his debt is not extinguished by the war. It is only suspended during the war, and revives in full force on the restoration of peace. A war, then, having certainly existed between Tennessee and the Federal government, from the President's proclamation of August 16th, 1861, and which, although a civil war, yet, according to the decision of the Supreme Court in the Prize Cases, carried with it all the consequences and disabilities of a public war, one of which, as we have seen, was the suspension of the right to sue during the war; it follows, therefore, that the plaintiff in this case could have instituted no proceedings in this court until peace was proclaimed by the President's proclamation of June 13th, 1865.

This suspension being by the exercise of the paramount authority of the government, cannot be held to work a forfeiture of the plaintiff's cause of action, but his right to sue, sus-

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pendent by the war, revived when it ceased ; and as it has not been three years from the maturity of the cause of action to the commencement of the war, and from the termination of the war to the commencement of this suit, this suit is not barred by limitation, and the demurrer is therefore overruled.

The case being then, by agreement, submitted to the court, judgment was given for the full amount of the plaintiff's claim, together with interest from the 26th of April, 1861, to the 16th of August, 1861, and from the 13th of June, 1865, to date, *no interest being allowed for the time during which the war lasted.*

George W. Brown and Arthur George Brown, counsel for plaintiff.

Jarvis Spencer, counsel for defendant.

United States Circuit Court, Eastern District of Virginia, at Alexandria, July, 1877.

UNITED STATES v. W. H. OTTMAN AND THE GERMAN BANKING
COMPANY OF ALEXANDRIA.

Congress has constitutional power to confer jurisdiction on the United States courts, of suits brought against defendants non-resident in the districts where the suits are brought.

Congress has conferred this jurisdiction as to suits against non-residents, commenced in the State courts by attachment and removed into United States courts, by sections 2 and 4 of the act of March 3d, 1875, "to determine the jurisdiction of the circuit courts of the United States," etc., etc.

A special plea of imprisonment is not valid in a civil action.

THIS is a suit in equity, commenced by process of attachment, which was brought in the Hustings Court of the city of Alexandria, Virginia, and afterwards, on motion of the United States, removed into this court. The demand of the United States

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against Ottman is for \$15,000, of which \$10,000 is claimed from the banking company as held for Ottman. At the time of commencing the suit, this sum of \$10,000, alleged to have been deposited by Ottman, and held on deposit in the German Banking Company of Alexandria, was attached; and publication was made, as required in such cases by the laws of Virginia. There were also attached in this suit certain shares of stock in the said banking company, and in the Alexandria Marine Railway Company, amounting in approximate value to two thousand dollars. The defendant, Ottman, is a citizen of the District of Columbia, and was at the time of the issuing of process in this suit, and is now, confined in the common jail there under indictment for complicity in the larceny of \$47,000 from the treasury of the United States, of which it is charged this \$10,000 deposited by him in the German Banking Company of Alexandria was a part.

The suit was first brought in August, 1875, and some proceedings were had in it in the fall of that year, but until recently it has been allowed to await the result of the indictment pending against Ottman in the District of Columbia, which has been mentioned.

In November, 1875, special appearance for the purpose, and motion, was made by the defendant, by counsel, to quash the attachments taken out in the cause, but the motion was overruled. Thereupon the defendant entered by leave a special appearance for the purpose, and filed, January 5th, 1876, a plea setting forth that he was held in jail by the plaintiffs in the District of Columbia, and thereby prevented from defending the suit. Afterwards, in May last, the defendant filed a plea to the jurisdiction of the court, and also entered a motion to dismiss for want of jurisdiction. The plaintiffs demur to the first of the two pleas, and join in the other, and on this state of facts and pleadings the cause is now heard. Defendants' counsel also declare a purpose, if their plea to the jurisdiction is overruled, to demur to the bill, and have, in argument, set forth the grounds of their demurrer.

The principal point relied on by counsel for the defendant in the argument is, the want of jurisdiction, by reason of Ottman being a non-resident of the district in which the suit was brought.

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HUGHES, J.—This is an action in which the United States is complainant, and not one between citizen and citizen, in which either plaintiff or defendant must be a non-resident, in order that the court shall have jurisdiction. It is a suit which, to be effectual to secure the money claimed of the German Banking Company, must of necessity be brought in this district, and could not reach the money if brought in the District of Columbia. The object of the suit cannot be attained by suing elsewhere; and this suit, to accomplish the ends of justice by securing a trial on the merits, must proceed either in the State court or in this court. It is a case, therefore, for a liberal and not a narrow or technical construction of the law regulating the jurisdiction of the court.

The provisions of law on which that jurisdiction depends are as follows:

Section 1 of the act of Congress of March 3d, 1875 (which appears as chapter 137 of the acts of 1874-5, vol. 18, p. 470, of the U. S. Statutes at Large) provides in substance, that the circuit courts of the United States shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in which the United States are plaintiffs or petitioners. But no civil suit shall be *brought* before a circuit court of the United States against any person *by any original process* or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, *except as hereinafter provided*.

Section 2 provides that in any suit of a civil nature, at law or in equity, hereafter brought in any State court where the matter in dispute exceeds the sum or value of five hundred dollars in which the United States shall be plaintiff or petitioner, either party may remove said suit into the Circuit Court of the United States for the proper district. On being so removed, *the cause shall then proceed as if it had been originally commenced in the said Circuit Court*.

And section 4 of the act in question provides in substance, that when any suit shall be removed from a State court to a cir-

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cuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree, *in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced*, etc., etc.

This act of Congress is substantially the same as the corresponding sections of the Judiciary Act of 1789.

The decisions of the United States courts under this legislation of Congress have been as follows:

In *Pollard v. Dwight*, 4 Cranch, 421, the proceeding was commenced by process of foreign attachment in the State court, and was removed by the defendants into the United States Circuit Court for that judicial district. The Supreme Court held that by appearing and pleading to issue the defendant waived all objection to the service of process.

In *Toland v. Sprague*, 12 Peters, 330, where suit was commenced in the Federal court by foreign attachment, the Supreme Court decided that the process of foreign attachment cannot properly issue from a circuit court of the United States against the property of a person not resident in the judicial district for which the court is held, but that if a non-resident defendant appears to such process, and pleads to issue, he waives his exemption from liability to the service of process against him, and the court thereby acquires jurisdiction.

In *Levy v. Fitzpatrick*, 15 Peters, 171, the court says: "No judgment can be rendered by a circuit court against any defendant who has not been served with process issued against his person in the manner pointed out in Section 11, Judiciary Act of 1789 (Section 1 of act of 1875), unless the defendant waive the necessity of such process by entering his appearance to the suit."

In *Day v. Hayward* and *Chaffee v. Same*, 20 Howard, 214, the court held in the general terms which it had used in *Levy v. Fitzpatrick*. That case was one where the suit was brought in the United States Circuit Court against a non-resident, and, on failure of the marshal to find the defendant, process of attachment had been taken out against the defendant's estate in

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accordance with the practice observed in the courts of that State. At the hearing the defendant had not appeared nor pleaded to issue, and it was held that there was no jurisdiction.

In *Herndon v. Ridgway et als.*, 17 Howard, 424, which was a suit in equity against several defendants who were non-residents, and who had not been served with process, the court said :

“The jurisdiction of the Circuit Court over parties is acquired only by a service of process or their voluntary appearance. It has no authority to issue process to another State. In the present case the defendants decline to appear, and process cannot be served, so that the court is without jurisdiction over the essential parties to the bill.”

In *Sayler v. Northwestern Insurance Company*, 2 Curtis, 212, it was decided that where a suit was commenced by foreign attachment in a State court, if the defendant appears there, and by motion remove the cause to the Circuit Court of the United States, it is then too late to object to the jurisdiction of that court, or to raise the objection in the United States court of non-residency in the judicial district.

Five years after the decision of the Supreme Court in *Day v. Haywood*, which was the latest of the cases cited above, the case of *Barney v. The Globe Bank of Boston*, 5 Blatchford, 107, was decided. It was there held that a suit commenced in a State court by attachment upon property of a non-resident defendant, without personal service upon the defendant, was within the meaning of the law of the United States relating to the removal of suits, and that the Federal court has jurisdiction of the cause, if properly removed, whether the defendant appears or not, although it would not have jurisdiction to compel the attendance of defendant if the suit had been originally brought in that court.

In the cases in *Cranch*, in *Curtis*, and in *Blatchford*, the suits were commenced by attachment against the property of the non-resident defendant in the State court, and in each case the suit was removed into the Federal court on the motion of the defendant. In each case the jurisdiction of the Federal court was sustained.

In the cases in 12 *Peters* and 20 *Howard* suit was commenced

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by attachment in the Federal court. In one of them the defendant appeared and pleaded to issue, and was held to have waived thereby his right of objection to the jurisdiction. In the other the defendant did not appear or plead to issue, and it was held that there was no jurisdiction to compel him to do so.

In the cases in 15 and 17 *Peters* it was decided, generally, that judgment or decree cannot be rendered against a defendant unless service of process has been made upon him in the manner required by the 11th section of the act of 1789 (Section 1 of act of 1875).

The case now before us being one properly commenced in a State court, and properly removed to the Federal court, it would seem to fall within the control of the decisions in *Cranch*, *Curtis*, and *Blatchford*, and, being dissimilar in essential particulars from those in *Peters* and in *Howard*, which were not removed suits, would seem not to be governed by those cases.

There can be no doubt that the suit was rightfully brought in the State court. It is not pretended but that that court possessed full jurisdiction to entertain and proceed in it. There can be no doubt that it was a removable suit, and that it has been removed here regularly, legally, and by proper proceeding. Indeed, counsel for defendant argued affirmatively that all these things were so, except the second proposition, as to which they maintain that it ought to have been a suit at law, and not in equity. They only contend that, now that the suit has got here, this court cannot proceed with it, for want of jurisdiction *to proceed*.

But I think jurisdiction to remove carries jurisdiction to proceed. Section 1 of the act of 1875 provides only that such a suit as this shall not be *brought here by original process*. As this suit was not originally brought here, nor brought here at all by original process, that prohibition of the statute is not violated. True, the statute requires that, after a suit is removed here, it shall be proceeded in as if it had been originally commenced here, and it is contended that this requirement means *only* as "if originally commenced" here, and that inasmuch as the suit could not have been commenced here at all, it cannot be proceeded in here at all.

Such a construction of the clause relied on would lead to the

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mockery of allowing a cause, proper for removal under the law, to be removed only for the purpose of turning it out of court. Such a construction is, of course, not to be given, if it can be avoided. Happily, this construction is especially forbidden by Section 4 of the act, which makes an exception to this requirement of such suits as are commenced in State courts by attachment, and provides that, where any removed cause has been so commenced in the State court, such attachment shall hold the goods in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced. This provision would be a mockery if the view of the defendant's counsel were correct. How could the money attached in the hands of the German Banking Company be held in this cause for such decree as the State court could have given, if no further step could be taken here, especially if, as defendant's counsel contend, the suit cannot now be remanded to the State court? Surely Congress could not have intended that such an absurdity of consequences should be reached by judicial proceedings taken under its legislation.

The view of Mr. Justice Curtis, fully sustained by Judge Shipman, ought therefore in my judgment to prevail, that if the suit be one rightfully brought in the State court, and which the act of Congress authorizes to be removed thence into the Federal court, the very fact of authority to remove empowers the Federal court to take jurisdiction and proceed in the cause; the only real question in that court being, *was the suit rightfully removed?* If a cause has thus come into the Federal court, then section 4 of the act empowers and requires that court to go on with it, and to give such decree against the property attached as the State court should have given if the suit had remained there.

Congress has full constitutional power to give the United States courts jurisdiction over defendants non-resident in the districts in which suits against them are brought; and it has, in sections 2 and 4 of the statute under construction, given this power in the single instance of suits commenced by attachment in State courts, and removed into United States courts. This can easily be made apparent.

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It must not be overlooked that section 1 avoids the use of such language as would embrace removed attachment suits commenced in State courts, in the class of suits in which, in order that the Federal courts may have jurisdiction, it requires that defendants must live, or be served with process, in the judicial districts where the suits are brought. As if to discriminate attachment suits removed out of State courts, from suits commenced in the Federal courts, section 1 is particular to say that no civil suit shall be *brought in a Federal court by any original process*, in a district where the defendant is not a resident, or is not found; leaving suits *commenced by original process in State courts* out of its purview, to be governed by the provisions of sections 2 and 4, which follow.

Sections 1, 2, and 4 must of course be construed together. When so construed, they induce the following reasoning and lead to the following conclusions:

Under section 1, jurisdiction over non-residents is, in general, not given to the Federal courts *in any suit commenced by original process in the Federal courts*; but under sections 2 and 4 these courts may acquire such jurisdiction, by removal, over attachment suits *commenced by original process in State courts*. For sections 2 and 4 give jurisdiction of removed attachment suits *commenced by original process in State courts*, and this jurisdiction of such suits is good over non-residents, unless it is prohibited by section 1. But section 1 avoids such a prohibition, for its limitation of jurisdiction only applies to suits commenced by original process in the Federal courts; these limiting words not only not applying to removed suits commenced by original process in the State courts, but necessarily implying that jurisdiction in such suits is left to be determined by sections 2 and 4.

Moreover, even if the words *no civil suit shall be brought by any original process* in the Federal court against a non-resident could be construed as denying jurisdiction of suits brought by original process in the State courts,—even in that event the words at the end of the same clause, *except as hereinafter provided*, would require that the provisions in regard to attachment suits removed from State courts under sections 2 and 4 should be construed as falling within the exception.

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I must, therefore, overrule the plea to the jurisdiction, and deny the defendant's motion to dismiss for want of jurisdiction.

As to the plea of imprisonment, personal appearance is not essential in a civil action, and a defendant may be required to make defence by counsel to such an action, while in jail. This point has been already overruled in this cause on the motion to quash. See *Slade v. Joseph*, 5 Daly, 187, and *Olery v. Brown*, 51 How. Prac. R. (N. Y.), 92.

As to the objection intended to be raised on demurrer, that this being a case in which there is claimed to be complete and adequate remedy at law, equity has no jurisdiction, it is enough to say that this suit was brought in a Virginia State court, and that under the laws of Virginia, resort may be had by any creditor to a court of equity for an attachment to enforce a purely legal demand against a non-resident defendant.

The statutory provisions allowing this remedy may be found in the State Code, and in sections 7, 37, and 181, of *Daniel on Attachment*. The defendant's intended demurrer to the bill on this ground is therefore overruled.

So is his objection to the bill on the ground of multifariousness. The bill has but one object, to secure the payment of the debt directly by the defendant himself, and indirectly by his debtor, the German Banking Company.

It is therefore not multifarious.

A decree will be entered in accordance with this opinion.

L. L. Lewis, United States Attorney, and Jeremiah Wilson, for the plaintiff.

Matthew H. Carpenter and Francis L. Smith, for the defendant.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, May, 1877.*

MARY A. OWEN v. NEW YORK LIFE INSURANCE COMPANY.

The law of Virginia, contained in sections 19 to 36 of chapter 37, of the Code of 1873, does not affect the right of a foreign insurance company which complies with its terms, to move for a removal of a cause in which it is a party, from the State to the United States Circuit Court, under section 689 of Revised Statutes of the United States and its amendments.

Where, under the decision of the United States Supreme Court, in *New York Life Insurance Company v. Statham et als.*, 3 Otto, 240, a declaration framed before this decision is held to be demurrable, the court will, in its judgment sustaining the demurrer, take care that it shall not be in prejudice of the plaintiff's right to amend so as to claim the equitable value of the policy of insurance arising from premiums paid before the forfeiture of the policy by non-payment of the premiums accruing after the commencement of the civil war.

IN 1859, the New York Life Insurance Company executed a policy of insurance upon the life of Isham H. Owen, of Danville, Virginia, for the benefit of Mary A. Owen, his wife, in the sum of \$5000, for a premium of \$165.50 per annum, payable on that day, and annually on each succeeding 23d day of April in each year until the death of the husband. The premiums were regularly paid to John M. Johnson, an agent of the company, resident in Danville, for the years 1859 and 1860; but they were not paid afterwards; and Isham H. Owen died in October, 1862. Suit was brought in the Circuit Court of the State, for the city of Richmond, and, within the time prescribed by law, was removed into this court by *certiorari*, under section 639, of the Revised Statutes of the United States, clause third.

Under chapter 36, of the Code of Virginia of 1873, section 19 to 36 inclusive, "*foreign*" insurance companies not incorporated by the laws of Virginia, are required to perform, under penalties, certain acts, before engaging in business in the State; among which required acts are, the keeping an agent in the

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State empowered to acknowledge service of all legal process, and the depositing with the State treasurer of bonds convertible into cash, in guarantee of policies of insurance issued by them, and of taxes accruing and judgments recovered against them.

The plaintiff moves that the cause be remanded to the Circuit Court of Richmond, as having been improperly removed here.

The defendant demurs to the declaration and each count of it.

The declaration as amended consists of three counts. In each count the same contract is set out, viz.: that the defendant insured the life of plaintiff's husband for her benefit upon certain conditions; that all of those conditions were strictly complied with except one, which required the payment of a premium on the 23d of April, 1861; that a state of flagrant war existed at the time when that premium became due; that the plaintiff's husband died in October, 1862; and that due notice and proof of his death was given defendant as soon as the war ceased. In all of the counts the non-payment of the premium due April 23d, 1861, and April 23d, 1862, is admitted; and it is admitted that by the terms of the contract, as declared upon, it was expressly stipulated that it should become null and void by the non-payment of any premium.

The first count avers that the plaintiff was ready and willing to pay the premium due 23d of April, 1861 and 1862, but avers the defendant had no agent to receive them, and so plaintiff did not pay. The second count avers that the plaintiff was ready and willing to pay, and actually tendered the premium due April 23d, 1861, to one John M. Johnson, to whom the prior premium had been paid, who was then agent, etc., who refused to receive it, and that no tender was made April 23d, 1862, because defendant had no agent to receive it. The third count avers that plaintiff was ready and willing to pay, but did not pay, nor tender payment of premium due 23d of April, 1861 or 1862, because Johnson, who before that time had been agent, by his acts and words induced plaintiff to believe that he would not receive the money and give a valid receipt therefor, and there was no other agent of defendant to whom plaintiff could legally pay. Each and every count avers that war was flagrant on the 23d April, 1861, and continued so until after the death in 1862.

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Wood Bouldin, E. E. Bouldin, and Elisha Barksdale, for the plaintiff.

W. W. Old, and Johnston, Baulware and Williams, for the defendant.

HUGHES, J.—The case is before the court, first, on a motion to remand the cause to the Circuit Court of Richmond, whence it was removed into this ; and,

2d. On the demurrer of defendants to the declaration, or rather, to the second and third counts of the declaration, plaintiff's counsel admitting the first count to be defective in view of the decision of the Supreme Court of the United States, in the case of *New York Life Insurance Company v. Statham et als.*, 3 Otto, 24.

1st. As to the motion to remand, plaintiff's counsel cite the recent decision of the Supreme Court of Appeals of Virginia, in *The Continental Life Insurance v. Kasey*, from Roanoke County, 27 Grattan, 216. In that case, the motion to remove from the State to the United States court was made after a final trial, and the motion was properly denied. Such is not the case here. It is not pretended that the removal was made after trial, or final hearing, in the court of Richmond. True, the Court of Appeals go on in the opinion to argue and express the conclusion that a foreign company which complies with the requirements of the laws of Virginia imposed upon foreign companies, by depositing with her treasurer a certain amount of securities in guarantee of their policies, keeping an agent in the State empowered to acknowledge service of process, etc., etc., thereby becomes a resident company, and loses its right as a non-resident to remove a suit to the United States court. But the very facts of having such an agent, and depositing bonds of guarantee, etc., etc., such as the law of the State requires of "foreign" companies, are badges and demonstrations of non-residence; and it is difficult to see how the very proofs of a "foreign" company's non-residence prescribed and accepted as such by law, can be construed as constituting residence. At all events, the United States courts could not delegate to a State court, even of the highest resort and authority, as in this case, the determination of such ques-

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tions of residence and citizenship as involve the right of suing in the United States courts; and a decision even of the Supreme Court of Appeals of Virginia on this subject cannot be accepted as binding by this court. The motion to remove is therefore denied.

2d. As to the demurrer to the declaration; the averments of the three several counts of the declaration, so far as these are material to the questions raised by the demurrer, are substantially the same, though varying somewhat in detail. It is useless to particularize the distinction between these averments; because they all alike contain the common averment that war between the United States and the confederate States existed, and was flagrant on the 23d of April, 1861, and continued so after the 23d of April, 1862. The fact may be, that the war did not exist in a legal point of view until the 27th of April, 1861; but we are concluded by the averments of the declaration and each count of it, in this respect. The fact is asserted by the declaration, and conceded by the demurrer, that flagrant war existed on the 23d of April, 1861. This fact being assumed, there was not only a non-payment of the premium on that day, but such non-payment was obligatory in consequence of the existence of war. It would have been contrary to the public duty of the plaintiff to make the payment. It was decided by the Supreme Court of the United States in the case of *New York Life Insurance Co. v. Statham et als.*, that where the non-payment of a premium is caused by the intervention of war making it unlawful for the plaintiff and defendant to hold intercourse with each other, the defendant may take advantage of the non-payment so occasioned, and insist upon it as a forfeiture of the policy of insurance, where the policy made any non-payment the condition of forfeiture. That decision carries two propositions, viz.: first, that where non-payment of a premium is made by the policy a condition of forfeiture, that provision is binding, and the company may insist upon the forfeiture; and second, that when the non-payment occurs during flagrant war, making all intercourse between plaintiff and defendant unlawful, the non-payment is absolute; and, whether it would be excusable or not if happening under other circumstances, must be treated

Syllabus.

as a fixed fact, consequent upon the existence of war, of which the defendant may take advantage.

Inasmuch, therefore, as the declaration in each count admits the non-payment of the premium due on 23d of April, 1861, and on 23d April, 1862, and alleges the existence of war on both these dates, which is equivalent to alleging the illegality and nullity of the payments even if they were made, the demurrer must be sustained as against each of the three several counts.

But inasmuch as the Supreme Court, in its decision which has been cited, held that the assured was entitled to the equitable value of the policy arising from the premiums which were actually paid, the order of the court sustaining the demurrer shall be without prejudice to the right of the plaintiff to file an amended declaration, claiming the equitable value of the policy arising from the premiums paid on the 23d April, in 1859 and 1860.

I will also hear after notice a motion for leave to amend the second count of the declaration by striking out the averment of the existence of war on the 23d April, 1861.

United States Circuit Court, Eastern District of Virginia.

VENABLE & SON v. GEORGE S. RICHARDS.

Suits against revenue officers of the United States, on account of acts done under color of their offices, may be removed from State courts into the courts of the United States.

Section 10 of the act of Congress, approved March 8d, 1875, chap. 137, which repeals all acts in conflict with its provisions, does not repeal Section 643 of the Revised Statutes of the United States providing for the removal of suits from the State to the National courts in certain cases.

The term *granulated tobacco*, used in the second paragraph of Section 3368 of the Revised Statutes, is not synonymous with *snuff*, but is intended to refer only to chewing and smoking tobacco.

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Snuff is liable, under the acts of July 20th, 1868, June 6th, 1872, and March 3d, 1875, to a tax of thirty-two cents a pound.

ACTION of assumpsit.

This action was brought in the Circuit Court of the city of Petersburg. The defendant being a collector of internal revenue of the United States, and the suit being for taxes collected by him from the plaintiffs as snuff manufacturers, he filed his petition in this court for a writ of *certiorari* for the removal of the cause out of the State court. His petition was resisted by the plaintiff on the ground set forth by the Circuit Judge (Bond), in the following decision, who overruled their objection and granted the writ. The petition for removal was heard and granted on the 2d June, 1876.

L. L. Lewis, United States Attorney, for the petitioner.

R. G. Pegram and W. P. Burwell for the plaintiffs.

BOND, J.—Richards, the defendant in this action, was collector of internal revenue in the district where plaintiffs carried on business as manufacturers of snuff, and required of the plaintiffs the payment of a tax on the snuff manufactured by them, which the plaintiffs alleged was in excess of the tax legally demandable to the amount of five thousand and sixty dollars.

The plaintiffs appealed to the Commissioner of Internal Revenue for a reduction of the tax, as required by law, and asked that the excess might be returned to them, which the commissioner refused to do.

The plaintiffs brought suit in the Circuit Court of the State for the city of Petersburg to recover the sum of \$5060.96 so paid in excess of taxes, and the collector filed his petition in this court, under the act of 1866, Revised Statutes, 643, for a writ of *certiorari* to remove the cause from the State court into the Circuit Court of the United States.

This application is resisted on the part of the plaintiffs on the ground that the act of 1875, relating to the jurisdiction of the circuit courts of the United States, and to the removal of causes from the State courts thereto, repealed the act of 1866 relating

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to the same subject, and that as the defendant has not complied with the provisions of the act of 1875, chap. 137, his petition for a writ of *certiorari* ought to be disallowed.

The sole question, therefore, which the court is called upon to decide is, whether the 10th section of the act of 1875, chap. 137, which repeals all acts and parts of acts in conflict with its provisions, repeals the act of 1866, chap. 184, now contained in the Revised Statutes, sec. 643.

The act of 1875, by its second section, provides that all suits which arise under the laws of the United States shall be removed in the manner provided in that statute.

The act of 1866 (sec. 643 of the Revised Statutes) provides that, "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States on account of any act done under color of his office, or of any such law," the proceedings for removal shall be such as it prescribes.

So that it appears that to remove a case, under the provisions of the act of 1875, it is necessary only that it arise under a law of the United States, whereas, to remove it under the act of 1866, it is not only necessary that the suit should arise under a law of the United States, but that it should be brought against an officer of the United States, or some one acting under his authority.

The act of 1866 related to civil suits and to *criminal prosecutions* brought against the officers of the United States. The act of 1875 relates to civil causes only. So that, in one respect, it is manifest it was not intended to repeal, and does not repeal, the former act.

Again, under the act of 1866 all suits, without respect to the amount involved, may be removed, whereas, under the act of 1875, the matter in dispute must be of the value of \$500, exclusive of costs, so that it was not intended to repeal so much of the act of 1866 as allowed the removal of suits, when a revenue officer was concerned, which involved a less amount than \$500, because that provision is not in conflict with the act of 1875, allowing the removal of causes involving \$500 or upwards.

Again, by the act of 1866 the cause may be removed before trial or final hearing, while, under the act of 1875, it must be

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removed before the term at which it could first be tried, and under the one act a bond must be filed, while the other requires none, the removal being had upon the filing of a petition to that effect merely.

It seems to us that the act of 1875 was not passed to restrict, but to enlarge, the jurisdiction of the United States court.

In this suit the United States are the real defendants, and, while in other cases for the safety of litigants it may be necessary to require a bond to be given to abide the result of suit, when a revenue officer is sued, for whom the United States in his official capacity have made themselves responsible, such a requirement is unnecessary, and, when so many officers of the government are to be consulted in respect to the merits of a case, and the propriety and ground of defence, it is not unreasonable that a longer delay in the determination of the question of removal should be given, than in cases between individual citizens who have complete control over their own suits.

A general clause repealing all laws in conflict with a previous statute cannot be held to do so by implication. The former statute must be plainly in conflict with the repealing statute before it can be held to be repealed. We do not think the act of 1866, Revised Statutes, Section 643, is in conflict with the act of March, 1875, chap. 137, and the jurisdiction of this court over this suit will be maintained.

On the 5th of September, 1876, the case was heard on its merits.

The plaintiffs declared for two items of money claimed by them to have been collected by the defendant, as taxes upon snuff, in excess of the taxes allowed by law. One of these was the item of \$4731.84, collected between July, 1872, and March, 1875, on 39,432 pounds, at the rate of 32 cents a pound, whereas the rightful tax was alleged to have been only 20 cents. The other item was for a similar excess of taxation assessed between March, 1875, and June, 1875, on 4226½ pounds of snuff, at 32 cents a pound, instead of 24 cents, alleged to be the lawful tax, the excess being 8 cents a pound, or \$338.12. The two items make the aggregate sum of \$5069.96.

By stipulation between the parties, the questions of fact as well

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as of law were submitted to the court for decision, the court being held at this time by the district judge.

HUGHES, J.—Before the law of June, 1872, snuff and chewing tobacco were both taxed at the rate of 32 cents a pound. The law of 1872 taxed *snuff* 32 cents, and *granulated tobacco* only 20 cents. The plaintiffs insist that snuff and granulated tobacco are the same thing, and, as they were required by the collector (the defendant) to pay 32 cents, or 12 cents more than they say the law exacted before March, 1875, they sue for the difference. By the act of March 3d, 1875, the tax on “granulated” tobacco was raised to 24 cents a pound. After that the plaintiffs still paid 32 cents on their snuff (which they insist was granulated tobacco), or 8 cents more than they say the law allowed, and they sue for the difference.

The question is, and it is the only question in the case, what did Congress mean by “granulated” tobacco?

The first two paragraphs of section 61 of chapter 186 of the acts of the Fortieth Congress, approved July 20th, 1868 (Statutes at Large, volume 15, p. 153), provide as follows:

“On snuff, manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff flour, when sold or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff.”

“On all chewing tobacco, fine-cut, plug, or twist; on all tobacco twisted by hand, or reduced from leaf into a condition to be consumed, or otherwise prepared, without the use of any machine or instrument, and without being pressed or sweetened; and on all other kinds of manufactured tobacco, not herein otherwise provided for, a tax of thirty-two cents per pound.”

The Forty-second Congress passed a law (approved June 6th, 1872) amending that of the Fortieth Congress, but not affecting the clauses just quoted. Section 31 of the latter law (Statutes at Large, vol. 17, p. 250, at top), provided that section 61 (of the former act) be amended by striking out all after the second paragraph, and inserting in lieu of what was stricken out, the following words:

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"On all chewing and smoking tobacco, fine-cut, cavendish, plug, or twist, cut or granulated, of every description; on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened; and on all fine cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco, a tax of twenty cents per pound."

The law stood in this condition up to the time of the adoption of the Revised Statutes, June 22d, 1874, when the first of the two paragraphs given from the act of 1868 and the paragraph given from the act of 1872 were adopted, as containing the whole law of the subject; the second of the two paragraphs from the law of 1868 having been omitted from the compilation of 1874. It will be seen that the act of 1868 in the paragraphs given classified the tobacco which it referred to into two distinct divisions, calling one of them *snuff* and the other *chewing tobacco*.

Snuff of every kind, whether ground, dry, or damp, pickled, scented, or not scented, of all descriptions, and snuff-flour were taxed thirty-two cents.

And chewing tobacco, whether fine-cut, plug, or twist, or reduced from leaf into a condition to be consumed, or otherwise prepared, was taxed thirty-two cents.

The act of 1872 adopted these two paragraphs of the act of 1868 in terms; and by doing so, adopted also of course their classification, into *snuff* on one hand, and *chewing tobacco* on the other. But it enlarged the second class so as also to include smoking tobacco of every species. So that the law as it stood after June, 1872, taxed *snuff* in all its varieties in one class of taxable things, and *chewing and smoking tobacco* in all their forms, as another class. Under the head of snuff the law of 1872 mentions its different varieties, and adds to them snuff-flour. Under the head of *chewing and smoking tobacco*, the law of 1872 (and the Revised Statutes of 1874 adopts its language) mentions as the sorts of tobacco intended to be embraced in the classification, fine-cut, cavendish, plug, twist, cut or granulated, every description of these; also tobacco twisted by hand, fine-cut shorts, refuse and scraps, clippings, cuttings, and sweepings. In this enumeration it virtually defines *granulated tobacco* to be one class of *cut tobacco*.

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It seems to be plain, therefore, that the law of 1872 not only so classified and defined snuff, by the language used, as to forbid its being confounded with any of the terms which it used in enumerating the different sorts of chewing and smoking tobacco, but as if to make assurance doubly sure, it defined *cut tobacco granulated*; thus, by identifying *granulated* with *cut tobacco*, forbidding its being confounded with *snuff*.

When the oral evidence is taken in the trial of the cause, it is proved that granulated tobacco is a term not used by the trade. The witnesses examined were each asked what the law meant by *granulated tobacco*; and each one, while asserting that the term was unknown in the tobacco business, was unable to do more than give his own conjecture of what the statutory term meant, the witnesses seeming to differ widely with each other. None of them, however, spoke in such a way about snuff. There is no doubt what the statute means by *snuff*. Practically speaking, granulated tobacco has no existence in actual business, while snuff has. There is no identity between the two articles in practical business, and there can, therefore, be no repugnance between a clause of the law speaking of one of them and a clause speaking of the other.

In construing the acts of Congress which employ the term granulated tobacco, we must interpret it according to the context. So interpreting it, granulated tobacco must be classed as a species of chewing or smoking tobacco, and held to be synonymous with *cut tobacco* and not synonymous to *snuff*.

Judgment must go for the defendant.

United States Circuit Court, District of Maryland, at Baltimore.

GALE & AX v. P. G. SAUERWEIN, COLLECTOR.

Plaintiffs had their tobacco factory on Barre Street, Baltimore, and their store and warehouse on Camden Street. On the 1st July, 1864, they had on hand in Camden Street a large quantity of tobacco removed from Barre Street, on which duties had been paid before 1st July, 1864, as required by the act of 1st July, 1862. After the later act imposing

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higher duties went into effect, the United States collector of national revenue (the defendant) demanded and received from them, under protest, the increased duties.

Held, in an action to recover them back, that the increased duties could be recovered back, in view of the provisions of section 178 of the act of July 1st, 1864.

The facts of the case are stated by the judge :

GILES, J.—This action has been brought by the plaintiffs (who are tobacco manufacturers in this city) to recover back from the defendant the amount of certain duties on manufactured tobacco, paid by them under protest to defendant as collector of internal revenue for this district. The amount sought to be recovered in this action is the sum which plaintiffs were compelled to pay on the stock they had on hand on 1st July, 1864, which, when added to the sums they had paid on said stock before the last act went into operation, would make a sum equal to the increased duty imposed by said act. The case has been submitted to the court upon a case stated, which shows the following facts: That the plaintiffs have their factory on Barre Street, and their store and warehouse on Camden Street, in this city, to which they removed their manufactured tobacco for sale; that prior to 1st July, 1864, they made returns to the assessor of this district, of all the tobacco manufactured by them at the said factory, which was sold or removed for consumption or sale to their store, according to the form prescribed by the Commissioner of Internal Revenue; and they punctually and regularly paid upon the tobacco so returned the duties imposed by the act of Congress passed July 1st, 1862. That on the 1st day of July, 1864, the plaintiffs had in their store on Camden Street a large quantity of manufactured tobacco (removed from their factory on Barre Street) for sale, on which the duties had been regularly paid before the 1st day of July, 1864, to the defendant, as collector of the internal revenue for this district. That after the last act (which imposed higher duties) went into operation, the defendant required the plaintiffs to render to him an account of all their manufactured tobacco then on hand and unsold, and they were compelled to pay the increased duty on the same by paying a sum

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which, added to the duty paid by them on said goods before, made the sum equal to the duty imposed by said last-mentioned act. The facts of the case are stated at length in the "*case stated*," but I have thus briefly given sufficient to show the question which is submitted for my adjudication. The case has been ably argued by the learned counsel engaged in it, and is one not free from difficulty. The objection that has been raised to the plaintiff's right to recover in this case is, that the duties paid by them on the manufactured tobacco remaining in their store for sale on the 1st July, 1864, and which duties were paid from time to time as the said manufactured tobacco was removed from the manufactory of plaintiffs to their store for sale, were not due and demandable when paid; that no duty was imposed on it by the act of 1862 until it was *manufactured and sold*, or removed for consumption or delivered to others than agents of the manufacturers; and that the payments therefore made by plaintiffs are to be considered as voluntary payments, and not the payment of duties required by the act of 1862.

This is undoubtedly the provision of the law of 1862 in reference to the tax on tobacco and other manufactures, in this respect differing from the provisions of the same law in relation to the tax on distilled spirits, which was required to be paid on the number of gallons *distilled and sold or removed for consumption or sale*. But in the view I take of this case, it does not depend upon the provisions of the act of 1862, but on the construction which may be given to the proviso in the 173d section of the act of 1864. It does not depend upon the question "whether the duties when paid were legally due and demandable," *but whether they were actually paid* before the 1st of July, 1864, as I shall endeavor to show. Now the general scope and intent of the act of 1864 is to tax only future manufactures and productions. Its general provisions and penalties only apply to future acts. This will appear by reference to the various sections requiring licenses, the sections imposing duties on distilled spirits, and the sections imposing duties on other manufactures and productions.

Now such being the general provisions of the law, if the provision in the 173d section had been omitted there could have

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been no duty collected from manufactured goods in the possession of the manufacturer on the 1st of July, 1864, in any case. Now in reference to tobacco, this is clear from the 90th section of the act, which requires every one engaged in the manufacture of tobacco to render a true statement of all his stock on hand on the 1st July, 1864; and then provides that every such person shall keep in a *book* an account of all the *articles thereafter purchased by him, the quantity of tobacco, snuff, etc., sold, consumed, or removed for consumption or sale from the place of manufacture*; and shall in every week furnish the assistant assessor of the district a true and accurate copy of the entries *in said book during the preceding week*; upon which an assessment of the duties due by said person shall be made and transmitted to the collector of the district, to whom the duties shall be paid within five days. And the same is equally clear with reference to distilled spirits. For by the first paragraph of the 55th section the duty is to be levied and collected on all spirits that may be *distilled and sold*, or distilled and removed for consumption or sale, on or after the 1st of July, 1864. And if the second paragraph had not been added to said section the duty would have been imposed only on spirits distilled since 1st July, 1864. That part of the section is as follows: "And all spirits which may be in the possession of the distiller or in public store or bonded warehouse on the 1st day of July, 1864, no duty having been paid thereon, shall be held and treated as distilled on the 1st day of July, 1864, and so liable to the increased duty." This is the same in effect in reference to spirits as the proviso in the 173d section in reference to other manufactures, and I shall not further notice it. Now the proviso in said section is in the following words: "*And provided further, That all manufactures and productions on which a duty was imposed by either of the acts repealed by this act, which shall be in possession of the manufacturer or producer, or of his agent or agents, on the day when this act takes effect, the duty imposed by any such former act not having been paid, shall be held and deemed to have been manufactured or produced after said date,*" and so liable to the increased duty.

Now, they become liable on *two conditions*, both of which must concur: They must be in the possession of the manufacturer or

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his agent on the 1st of July, 1864, and no duty paid on them. Now, if any other construction is given to this proviso, and the similar one in section 55, you nullify one of the very conditions which Congress has said must exist before the manufacture is liable to the duty prescribed by the law of 1864; for the duties on spirits *in a bonded warehouse*, and the duties on goods in the *possession of the manufacturer, held by him for sale*, were not then due and demandable, although, in the case of specific duties—such as the duties on tobacco and spirits—the inspection and return had already given the data for calculating the duties. If you adopt the idea suggested in the argument, that there was no duty imposed on these manufactures in their condition on the 1st July, 1864, you strike down the whole of the proviso, for it includes only *manufactures and productions on which duties were imposed by the previous acts*, and the result is the same. I am gratified to learn that in the view I have thus taken of this question I am sustained by Judges Greer and Cadwallader, in the adjoining circuit. For although their decisions were made in cases involving the claim to impose the increased duty on spirits in the possession of the manufacturer or in a bonded warehouse on the 1st of July, the old or former duty having been paid, a careful perusal of these laws will show that in this particular there is no difference between those cases and the present one. The judgment will, therefore, be entered for the plaintiffs for the sum of \$4870.28, with costs.

William F. Frick, Esq., for the plaintiffs.

William Price, Esq., District Attorney, and N. J. Thayer, Esq., Assistant, for the defendant.

Statement of the case.

United States District Court of Maryland, April, 1877.

STATE OF MARYLAND, USE OF ANNA MURTAUGH, A CITIZEN
OF VIRGINIA, v. THE BALTIMORE AND POTOMAC RAIL-
ROAD COMPANY.

Responsibility of employer for injury to employé. Construction of statute
for wrongfully caused death.

BY statute of Maryland, similar to Lord Campbell's Act, an action is given in the name of the State, for the use of the person entitled to damages, whenever death shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not occurred, have entitled the person injured to damages. Such action to be for the benefit of the wife, husband, parent, or child, of the person whose death shall have been so caused.

The equitable plaintiff brought this action for damages for the killing of her son, an unmarried man, twenty-one years of age, by a collision of an express train of defendant, on which deceased was fireman, with a construction train, caused by a switch being negligently left open at the junction of the main track with a siding on which the construction train was standing.

The proof was that the express train was proceeding towards Washington, at its usual speed of thirty miles an hour, and the construction train which had been on the main track was moved off to and on the siding in order to allow the express to pass. By negligence of the hand in charge of the construction train, the switch, having been opened to allow it to pass on the siding, was not closed afterwards. That as the express train was approaching the siding, and nearing the Washington turnpike road, which the main track there crossed, the engineer saw the construction train on the siding, and at the moment of perceiving it his attention was necessarily directed to a wagon on the turnpike which was approaching very near the track, and as the train got close to the road, the top of this wagon hid from the

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view of the engineer the switch target until it was too late to stop, and the train ran in on the siding crashing into the construction train, and among other damage killing the plaintiff's son. That, but for this wagon, the engineer would have seen in time that the red side of the target was toward him, and could have stopped in time. That the place where the track crossed the turnpike was about seven miles from Baltimore. That the road was much travelled by market-people, and that the engineers of trains approaching it were compelled to look out for vehicles.

It was also proved that the deceased had materially contributed to the support of his mother.

It was contended for plaintiff that there was negligence on the part of the general management of the company in not providing proper precautions at the point of turnpike crossing, and at the station where the switch was, and that if these had been provided the collision, though caused by the negligence of the hands of the construction train, would have been prevented.

The defendant denied this, and also contended that if such negligence was proved, yet as the deceased had as fireman passed daily over the road where this alleged lack of proper care in providing for safety by the general management existed, he must be taken to have known the risk and incurred it as part of his service, and that as there was no proof he had complained of any such risk no recovery could be had.

All the cases on the subject were referred to by counsel, and defendant specially relied on the Maryland decisions.

GILES, J.—The judge in instructing the jury said he approved the decision in 20 Md., 220, but was not disposed fully to approve the subsequent decisions of that court to the extent to which they seemed to go on the point. That he was disposed to limit this to cases where the employé injured was managing machinery the defects of which he knew, or where the damage caused by negligence of the employer or his general agent, was in some particular in reference to which the employé was chargeable with the duty of operating and reporting to the employer if any danger existed, but he would not carry the principle so far as to affect with such responsibility any employé injured by

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negligence of the general management of a railroad, in some matter under the scope of the general management, and which they alone controlled and determined. On the point raised that as the son of plaintiff was over twenty-one no recovery could be had, the court decided that the true meaning of the statute was to give an action where an actual pecuniary damage had resulted by the death of the child, no matter what his age.

The court then gave the following written instructions to the jury :

1st. If the jury shall find from the evidence in this case, that when Patrick Murtaugh was killed by the collision between a passenger train and a gravel train on defendant's road, he was a fireman in the employment of defendant, and that this collision was caused by the neglect of the conductor, engineer, and flagman of the gravel train to close the switch, after they had backed said train on the siding to enable the passenger train to pass, then the plaintiff is not entitled to recover against the defendant for such injury, unless she should satisfy the jury that the defendant had not used ordinary and reasonable care in the selection of officers in charge of said train, and as she has offered no evidence on this point, she cannot recover in this case unless she recover under the *second* instruction of the court.

2d. If the jury shall find from the evidence that the siding on which the gravel train had backed is quite near the Washington turnpike road, that said road is much used by market-people with their wagons, and which is here crossed by defendant's road, and which requires the engineer of a passenger train as he approaches the said turnpike to give his attention to vehicles coming along the same, and that but for this necessity the engineer of the defendant's passenger train, going south, would have seen on this occasion the signal that the switch was open, and would have been able to slow his train in time to avoid the collision, then ordinary care and prudence required of defendant the appointment of a flagman, to be stationed at this junction of the two roads, and if the jury shall find that defendant had no such officer, and that if there had been such an officer stationed at this point the collision would have been prevented, the defendant is

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liable in this action for such damages as she, the plaintiff, may prove she has sustained by the death of her said son.

3d. If the jury shall find for the plaintiff, they shall give such sum as they shall find from all the evidence will be an adequate compensation for the loss of such pecuniary support as the jury shall find the plaintiff would have received from the deceased, and in making such estimate they shall consider the age of the plaintiff and the probable duration of her life.

Verdict for plaintiff for \$2500.

William F. Giles, Jr., and Archibald Stirling, Jr., for plaintiff.

Bernard Carter, for defendant.

*United States Circuit Court, Western District of North Carolina,
at Greensboro'.*

NATHAN KITCHEN & Co. v. N. W. WOODFIN AND R. W.
PALLIAM.

Under the laws of North Carolina, where money collected on execution is directed by the State law to be paid by the sheriff to the clerk, the clerk receives it as agent of the law, and not as agent of either party to the suit, unless made so by express agreement, or by acts from which such agreement may be fairly implied, and therefore, the clerk's commissions on the money so received are part of the costs of a suit, to be paid by the defendant, for which execution may issue.

The same is true as to the commissions of the sheriff, and (under section 829, Revised Statutes of the United States) it is true also as to clerks' and marshals' commissions in the Federal courts.

THE plaintiffs recovered judgment for the sum of \$12,510.43 and costs. After the execution was issued to the marshal, the defendants filed with the clerk receipts from the plaintiffs amounting to \$7050, which were entered as credit on the execution docket.

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While the execution was in the hands of the marshal, the defendants paid the attorney of the plaintiffs \$3800, and took receipts for said payments. The marshal received these receipts in part satisfaction of the execution, and collected the balance due in cash, and made return of said receipts and cash to the clerk.

DICK, J.—During the last term of the Circuit Court, at Asheville, I was called on to decide as to the commissions to which the marshal was entitled. I am now called upon by a case argued to determine the compensation of the clerk for receiving, keeping, and paying out the money collected. A similar question arose in the case in equity, *Henry Clews and others v. W. N. C. R. R. Co.*, but it became unnecessary for me to decide the same, as the parties agreed with the clerk upon a satisfactory compensation.

As questions of this character may frequently arise in the courts of this district, I have concluded to file an opinion setting forth the law on the subject, for the information of parties to suits, and for the guidance of the officers of the courts.

The act of Congress (Revised Statutes, section 829) provides that for services rendered under an execution, the marshal shall be entitled to "the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States respectively in which the service is rendered."

In this State, the principles of law defining the rights of a sheriff to commissions upon an execution in his hands, are clearly set forth in *Willard v. Satchwell*, 70 N. C. R., 268, and the authorities cited.

When an execution is issued to a marshal, he is bound to obey the exigency of the writ, and he at once becomes entitled to his commissions, if the defendant has property subject to levy sufficient to satisfy the execution; and he cannot be divested of this right in any way except by his own neglect of duty.

The fee bill (Rev. Stat., sec. 828) provides that the clerk shall be allowed: "For receiving, keeping, and paying out money in pursuance of any statute, or order of court, one per centum on the amount so received, kept, and paid." This right of the clerk

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is not regulated by the law of the State in which the clerk renders the service, but is dependent upon the construction of said clause in the statute. Certain fees are allowed the clerk for issuing an execution and making an entry of the return of the marshal. He incurs no responsibility as to money raised upon an execution until it is paid into his office. When he receives money he incurs risk and responsibility, and then the compensation above mentioned, "on the amount so received, kept, and paid." In this case the clerk is entitled to one per centum on the money (cash) which came into his hands, and was paid out by him.

On the second question presented in the case argued, it is insisted that in receiving, keeping, and paying out the money collected on the execution, the clerk acts as the agent of the plaintiffs, and ought to retain his compensation out of the fund. The law imposes on a clerk the duty of receiving money collected on an execution when returned by the marshal. This legal requirement imposes only an official duty, and does not constitute the clerk the agent of the plaintiff for receiving, keeping, and paying out money due on a judgment. The clerk is an agent of the law, and not of the parties in suit, unless made so by express agreement, or by acts from which such agency may fairly be implied. *Parvis v. Jackson*, 97 N. C. R., 474. When a plaintiff succeeds in a civil action, he is ordinarily entitled to a judgment for all costs properly incident to the cause. This judgment includes all the costs belonging to the action, whether prior or subsequent to the rendition of judgment. If new costs accrue the judgment opens to receive them. *Peyton v. Brooke*, 1 Curtis, U. S. Decisions, 535.

The law directs a clerk, before issuing a summons in a civil action, to take a prosecution bond from the plaintiff, with sureties, to indemnify the defendant against costs. The sureties to this bond are only bound for the costs of the defendant; and for this reason the clerk and marshal may require the plaintiff to pay fees before any service is rendered. If the plaintiff pays fees to the officers, and afterwards succeeds in his action, he is entitled to have such fees taxed in the bill of costs against defendant. After judgment a successful plaintiff is never liable for ordinary costs unless the defendant is insolvent.

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In this case the clerk must look to the defendants for his compensation for the money received and paid out by him, and can have an execution for the same as a part of the costs of the cause.

*United States Circuit Court, Eastern District of Virginia,
at Richmond, April 18th, 1877.*

J. B. BLAND & Co. v. THE SOUTHERN EXPRESS COMPANY.

Bulky produce, not such as an ordinary express company usually transports, was shipped by the freight cars of a railroad company, to a distant railroad wayside depot, to the name of the person who shipped it; this person wrote on the railroad receipt the words, "Deliver to S. H. Brown & Co.," who were living at the place of destination, and drew a sight draft upon S. H. B. & Co. for the value of the produce, and took the railroad receipt and draft to the office of an express company, delivered them to a clerk of the company, and obtained the express company's receipt for the draft "for collection."

The depot agent at the destination of the goods, who was also the agent of the express company, delivered the produce to S. H. B. & Co. as agent of the railroad company, upon ascertaining from the writing on the face of the receipt of the railroad company, sent him by the express company, that the goods were intended for S. H. B. & Co. In an action brought by the shipper of the produce, against the express company for the amount of the draft,

Held, that the railroad company had a right to deliver such bulky produce to the consignees as soon as they were identified; that the express company did not by construction or actually have custody of the produce, and was not bound to take custody of it, and did not become liable for its value in consequence of its own agent (acting as agent of the railroad company) having delivered the produce, instead of holding it until the payment of the drafts.

THIS was an action of assumpsit for the value of certain shipments, chiefly of bulky produce, made under the circumstances detailed by the court in its written decision.

There was a trial by jury, and a verdict for plaintiffs. A motion for a new trial was introduced and was argued by Robert Howard and John S. Wise, for the plaintiffs, and by

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Robert Ould, for the defendants. The following was the decision of the judge :

HUGHES, J.—The plaintiffs, J. B. Bland & Co., living and doing business in Richmond, made three several shipments on freight cars of the Chesapeake and Ohio Railroad Company, chiefly of heavy produce, including a carload of hay, 110 barrels of flour, 150 bushels of meal, 75 bushels of corn, to Cotton Hill depot, in the mountains of West Virginia, consigned to themselves (J. B. Bland & Co.). These shipments were, nearly all of them, not of such articles as were in the line of business of the Southern Express Company.

The plaintiffs took receipts of the railroad company for each shipment. They wrote on the face of these receipts the words, "Deliver to S. H. Brown & Co. : J. B. Bland & Co."

They took these drafts and receipts to the office of the express company in Richmond, delivered them to one of the clerks in the office, and obtained the company's receipt for the drafts, "for collection."

The depot agent of the railroad company at Cotton Hill and the agent of the express company there were one and the same person. As soon as this agent learned from the writing on the face of the railroad company's receipt, that the shipments were intended for S. H. Brown & Co., he delivered them to that concern, stating in evidence that he delivered them as agent of the railroad company. He also presented the drafts to the concern for payment, which they were unable to make. He duly returned the drafts and receipts to the express company at Richmond with a memorandum on them, "not paid for want of funds," and the plaintiffs were duly notified of their action.

This action is brought for the face value of these three drafts, and is founded on the supposition that the express company became liable by having delivered the produce shipped before the drafts were paid.

The course of making shipments by freight cars on the railroads of this country, is for the shipper to pay or not pay the freight charges on delivering the goods for shipment, to take the railroad company's receipt, and to mark the consignee's

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name on the goods, or indicate it to the company on making the shipment. The goods or produce are delivered to the consignee by the depot agent at the place of destination, on arrival, on demand. It is not the custom of railroad companies to receive drafts or bills of exchange for collection at all, not even drafts for the value of the particular shipments on which they are drawn, or to hold the goods or produce until these drafts are paid. Such a proceeding would be foreign to the business of railroad companies; is never allowed by them; is generally impracticable in itself; and is wholly unknown in practice. There are many reasons why this proceeding could not obtain; one of which is, that necessity requires that produce should be delivered promptly on arrival, especially at wayside depots, being in general too bulky to admit of being stored, and being such as would clog and glut wayside depots beyond their capacity. The depot in this case was in a narrow pass in the mountain, on the banks of a turbulent river; and, of the produce shipped by the plaintiffs, there was, among other things, a carload of hay which could not be stored at all, a carload of flour which would unduly incumber the small depot building there, and other things equally bulky and inconvenient to store. It would have been vain, idle, and preposterous for the plaintiffs in this cause to have endeavored to induce the railroad company to agree to hold their produce until the drafts for its value were paid. That would have been foreign to the usage of the railroad company, probably impracticable in itself, and a sort of engagement which the company could not, consistently with its modes of transportation, its interests, and its principles of business, make with any customer.

The plaintiffs here have sought to accomplish by indirection what it was not practicable for them to do by direction, of course without improper motive. They sought to bring the express company under obligation to do what the railroad company would not do. They sought so to contrive as to secure the holding at *Cotton Hill* depot, until their drafts were paid, of the bulky produce which they had shipped there, in spite of the usage of the railroad company not to hold produce until drafts drawn against it were collected.

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The Southern Express Company, like other express companies, does two kinds of business. 1st. It carries in express cars, light freights, called express freights; often collecting the value of the parcels carried on C.O.D. drafts. 2d. It receives for collection and collects drafts drawn upon places where there are no banks, not accompanied by goods shipped by express to the persons on which such drafts are drawn.

It was the latter kind of transaction which the express company in this case undertook for the plaintiffs. It received nothing besides the drafts but railroad receipts, having on their face a designation of the firm to whom the shippers intended that the produce should be delivered.

The writing on the face of these receipts did not say that the receipts were not to be delivered to S. H. Brown & Co. until the drafts were paid, and even if it implied as much, there was no breach of such an order by the express company; for it had custody of nothing but the drafts and receipts, and has never parted with the custody of either.

The writing on the face of the railroad receipts did not in terms give any direction in regard to the produce, which was in custody of the railroad company; but, even if it had done so, it could not thereby have imposed upon the express company an obligation to hold freight which was not in their custody, in violation of the usage and convenience of the railroad company, and in a way probably impracticable in itself.

The plaintiffs could not by delivering a draft for collection to an express company, coupled with a railroad receipt, impose upon the express company, by implication, through the inadvertence of a clerk of the express company in receipting for the draft, an obligation to do that with freight, shipped by the railroad, which they could not by any possibility have induced the railroad company itself to do.

The railroad company by its agent had a right, at such a depot as Cotton Hill, to deliver such bulky and cumbrous articles as were shipped in their cars, to the person to whom they were shipped, as soon as it identified that person; and neither the plaintiffs alone, nor the plaintiffs and express company together,

Syllabus.

could take away or limit that right. It could only be limited by an agreement of the railroad company itself.

That right the railroad company through its own agent exercised in this case. If there was any responsibility incurred by so doing, the responsibility is on the railroad company, for it alone had the custody of the produce.

The express company did not only not have custody, but was justified in not taking custody of such produce at such a place, for the purpose, even if it had been practicable to hold it, of holding it in violation of the usage of the railroad company. Such an undertaking would have been out of its line of business, and could not be implied from any routine action of one of its clerks.

The declaration in this case charges throughout, that the express company had custody of the produce which was shipped by the plaintiffs. The proof is that the produce was never in custody of the express company, but that it was delivered to S. H. Brown & Co. by the railroad company, without ever having been in the custody of the express company.

I think the verdict was so clearly contrary to the law and the evidence as to justify the court in setting it aside, which is accordingly done.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, August 2d, 1877.*

THE VIRGINIA GOLD CASES.

UNITED STATES v. WILLIAM SMITH, AND TEN OTHER SIMILAR
CASES.

Where a person was indebted, for money had and received, to one of the insurgent State governments which were overthrown by the United States in 1865, and was sued by the United States, after the return of peace, in an action of *assumpsit*; on demurrer,

Held, that the original *assumpsit* of the defendant to the insurgent State government was a debt at common law and not *jure belli*; and that, the United States having succeeded by right of conquest to the debt, the law, after peace, implies an *assumpsit* by the defendant to pay the debt

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to the United States, and will treat the latter *assumpsit* as a common law obligation and not as arising *jure belli*.

Held, also, that a circuit court of the United States has jurisdiction of an action of *assumpsit* brought upon such a debt, whether arising at common law or otherwise.

THE government of Virginia under the confederacy, having borrowed a large amount of specie from one of the banks in Richmond, the then governor (William Smith), and other officers, withdrew it on or about the 2d day of April, 1865, which was the day preceding the occupation of Richmond by the Union army. Of the specie there were received in distribution by several officers respectively, the following sums, to be accounted for as advances of salary for the fiscal year, commencing April 1st, 1865, viz.: by

William Smith,	.	.	.	.	.	.	.	\$5000
George W. Mumford,	.	.	.	.	.	.	.	2000
John O. Chiles,	.	.	.	.	.	.	.	1000
Edward H. Fitzhugh,	.	.	.	.	.	.	.	1000
P. F. Howard,	.	.	.	.	.	.	.	500

At a later date, to wit, in August, 1865, further sums of this specie were distributed to officers of the government then expired, to wit: to

Henry W. Thomas,	.	.	.	.	.	.	.	\$500
Shelton C. Davis,	.	.	.	.	.	.	.	800
John L. Shackelford,	.	.	.	.	.	.	.	100
Daniel Denoon,	.	.	.	.	.	.	.	100
S. L. Moncure,	.	.	.	.	.	.	.	100
A. A. Lorentz,	.	.	.	.	.	.	.	100

During the first session of the legislature of the Alexandria government (that of 1865-66), the committee of courts of justice of the House of Delegates was charged with an inquiry into this matter. On December 20th, 1865, that committee reported, through William T. Joynes, one of its members, that in respect to this money, the then State government of Virginia did not succeed to the rights of the State government which was overthrown in April, 1865, and could not claim this money; and,

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that whatever rights of conquest accrued by the overthrow of the late government belonged to the United States.

There was no demand or suit by the subsequent State government for these sums of money. Latterly, the United States have brought actions of *assumpsit* against each of the persons named after personal demand made. The amount received by E. H. Fitzhugh was some time ago paid by him into the treasury of Virginia. As but one of the suits (that against William Smith) involved a sum large enough to authorize it to be carried to the Supreme Court, that has been heard first, and the others will be stayed to await the result, in order that the principle which may be settled in it may govern the other cases.

The case was heard in June on the demurrer to the declaration; and the decision of the court on the points raised by the demurrer was rendered on the 2d day of August, 1877.

R. T. Daniel, Attorney-General, W. B. Taliaferro, Robert H. Stiles, Bradley T. Johnson, and William L. Royal, for defendants.
L. L. Lewis, District Attorney, for plaintiffs.

HUGHES, J.—This case is before me not upon issues of fact, but upon facts admitted by demurrer, and upon the law as arising upon the facts so admitted.

The allegations of the declaration are these:

1st. That the defendant was indebted to the insurgent government of Virginia in the sum of \$5000 on the 2d day of April, 1865

2d. That he promised the said government to pay the said indebtedness.

3d. That the said insurgent government was, on the 9th April, 1865, overthrown by the United States by force of arms, and the lawful authority of the United States re-established in the State; and,

4th. That the defendant, after the said 9th day of April, 1865, in consideration of the premises, undertook and promised to pay to the United States the said sum of \$5000.

The demurrer admits these allegations to be true; yet denies

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that they constitute a case of indebtedness by the defendant to the United States, and prays judgment, etc.

In technical strictness, by admitting the truth of these several allegations, the demurrer admits the case of the plaintiffs to be sufficient to warrant a judgment for him.

But let it be assumed that the fourth allegation, being an inference of law, is not admitted by the demurrer. Then, the question for decision is, whether the United States acquired by conquest of, and succession to, the insurgent government of Virginia, on the 9th April, 1865, such a right to the money which was then due from the defendant to the insurgent State government as was valid and sufficient to raise the *assumpsit* set forth in the fourth clause of the declaration.

Stating the case differently, the question before me is, whether the United States succeeded by conquest and succession to the rights of action, as well as the property, of the insurgent State government, which was overthrown on the 9th April, 1865. If so, the law will adjudge that the defendant promised to pay to the United States the money which he thus owed to that government, and the court will render judgment against him accordingly:

As a matter of history, it cannot be disputed that it was the power of the United States, and not of any State, or of what was called the Alexandria government of Virginia, which was brought to bear against the insurrectionary governments of the South; or, that the overthrow and conquest of the insurrectionary government of Virginia was in fact effected by the United States. Therefore, whatever rights of property or of action ordinarily result under the law of nations and of war from conquest, resulted to the United States, on the 9th April, 1865, and did not result to what was called the Alexandria government of Virginia.

The very able committee of the General Assembly of Virginia, Mr. Marshall at its head, which had this matter in charge, in the winter of 1865, in the report submitted through one of its members, Judge Joynes, one of the ablest and most learned judges of the State, conceded this right to the United States in their report, in which they said:

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"It is very clear that the present government representing the State of Virginia cannot assert any claim to this money by right of conquest, for all the rights of conquest, whatever they be, belong to the United States."

And, therefore, the particular question for decision in this case is, whether the right of action, which the demurrer admits that the insurgent State government of Virginia had against the defendant on the 2d to the 8th April, 1865, for \$5000, passed by conquest, and, after the peace following complete conquest, to the United States, on or after the 9th April, 1865. Does succession, after complete conquest and peace, give to the conquering power the right of enforcing, by civil action, the payment of debts due, at the date of conquest, to the conquered power? In this case it is to be observed that there was not merely a temporary conquest, and that condition of *quasi* belligerence attending such an event, but complete and final conquest producing absolute peace, and that undisputed succession of one power by the other resulting from such a conquest. It was a case of undisputed succession peacefully held after complete, final conquest.

I will also premise that such suits as this can affect only such property or rights of action as belonged to the insurgent government of Virginia *as such*, and not property or rights which belonged or belong to the people of Virginia through their legal government. The former alone were the subjects of conquest; the latter were not.

Speaking of what passes by conquest to the conquering power, the Supreme Court of the United States says, in *United States v. Lyon et al.*, 16 Wallace, 435, the conqueror's "rights are no longer limited to the mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of a conquered State, including even debts as well as personal and real property." Mr. Justice Clifford, in delivering this opinion of the court, and using the language thus quoted, simply gives expression to the settled principle of the law of nations.

In the case of *The Attorney-General of Bombay v. Amerchand*, cited at length in *Elphinstone v. Bedreechum*, 1 Knapp's P. C. Cases, 329, it was held that money in bank belonging to a con-

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quered prince may be recovered in a suit against the banker by the conquering nation.

In the case of *United States v. McRae*, English Law Reports, 8 Equity Cases, p. 72, it was said by the vice-chancellor :

"I apprehend it to be *clear, public, universal* law, that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouse, fort, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power, and it would have the right to *call to account any fiscal or other agent, or any debtor* or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right, not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it."

All the authorities have held the same doctrine, and, indeed, it has never been disputed.

These authorities close the question in favor of the right of the United States to the property of the overthrown government of Virginia, as the insurgent government, and to the debts due, whether from citizens or from foreigners, to that government, at the time of its overthrow.

The objection of defendant's counsel, that *assumpsit* will not lie for an obligation arising by implication from a debtor of a conquered State to the conquering government after conquest, because promises do not arise from acts of violence, is not tenable. It is not denied, it is admitted by demurrer, that the defendant by receiving from the State government before its overthrow, \$5000 not due to him, became indebted to that government. It is settled law, as already shown, that a conquering power after the conquest, succeeds to the debts which were due

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to the conquered power. If, therefore, by the law of nations, which is part of the law of England and America, such a debt becomes due from a citizen to the conquering power, then the law of England and America, even the common law of the two countries, *implies* an *assumpsit*, a promise on the part of that citizen to pay the debt. The citizen owes the debt to some one. The money he owes does not belong to himself. He is bound in conscience to pay it to the rightful owner, who is entitled *ex equo et bono* to receive it. And the law of nations, as well as of England and America, declares that the conquering power is that rightful owner. There is no *violence* between the debtor, as such, and the conquering power. The violence was between the two governments. The debt, as a debt, becomes due to the conquering power, irrespective of the consideration whether the debtor was a combatant or a non-combatant. In his character of debtor, not in that of man or woman, combatant or non-combatant, native or foreigner, he became, *qua* debtor to the conquered power, the debtor of the conquering power.

This is not a question between soldier and citizen, growing out of acts committed while war was flagrant, in the course of the soldier's service, as in *Hughes v. Litsey*, 5 Am. L. Reg., 148. Nor is it a question of prize or capture *durante bello*, concerning property taken or right acquired during the progress of war, as in *Coolidge v. Guthrie*, 8 Id., 22; and in *Elphinstone v. Bedreechum*, 1 Knapp, P. C. C., 300, where the court expressly says that the capture was made *nondum cessante bello*.

The indebtedness of the defendant in this case to the insurgent government of Virginia, was not one arising *jure belli* between belligerents, but by contract between friends. It is true that the succession of the United States to the insurgent government was an event *durante bello*; but that event having been completed, the indebtedness of the defendant to the succeeding government arising after the close of the war, was not an indebtedness *jure belli*, but by contract. Being indebted, the implied *assumpsit* of the defendant to pay, his promise to pay, is a common law obligation. A debtor may be liable in *assumpsit* to a creditor, but if by violence the creditor is killed, the debtor then becomes liable in *assumpsit* to the creditor's administrator.

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I do not think, therefore, with defendant's counsel, that this is a case of first impression. It is an action at common law, founded upon a contract arising of common law implication, and as such, is not new or unprecedented.

Nor is the objection of defendant's counsel tenable, which they take on the score of the jurisdiction of the court. The circuit courts of the United States have original cognizance "of all suits at common law, etc., etc., where the United States is plaintiff" (see clause 3 of section 629, U. S. R. S.), or in other words "of all suits of a civil nature at common law or in equity, etc., etc., in which the United States is plaintiff, etc., etc." (Section 1, Jurisdiction Act of March 3d, 1875.) These definitions of jurisdiction do not refer to the *claim* sued upon, its character or its origin, but only to the nature and form of the *action* which may be made the instrument for establishing the demand. A citizen of the United States, indebted to a citizen of France by a contract made in Paris, may be sued in the Circuit Court of the United States for the district in which he resides in this country. His *demand* is not a common law demand, but if sued upon it, in an action at law, the *suit* is in form and character a suit at common law. He may be sued in *assumpsit*, if the demand be such as to make that form of action proper. So a demand arising *durante bello*, and not arising at common law, may be sued upon in an action at common law in this country, either in a State or Federal court. Under whatever law, whether of peace or war, of the domicile or foreign jurisdiction, the obligation of the defendant arises, the suit proper to enforce it according to the forms of action employed in England or this country, whether it be at common law or in equity, may be brought in the Federal courts, if the courts have jurisdiction of the parties to the suit.

As to the proposition of defendant's counsel, that this money is a trust fund, and the execution or abuse of the trust must be examined into by Virginia alone,—that is a question not yet arising in the cause, and it does not appear how it will arise. The State has, by adopting the report of the committee of 1865, and by long inaction, declined to look into or after the trust, if such it be. The defendant has put in no plea in the cause

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claiming that he has discharged his fiduciary obligations in respect to the debt as a trust fund. And it is not until all action of the sort has seemed to have become wholly improbable, that the United States have now moved in the matter.

As a preliminary step to devoting the fund to its trust purposes, it would seem incumbent that the person charged with the legal title in the trust should proceed to collect it in, and as the legal title, by the law of nations and of the land, is in the United States, we have a right to presume that, if the fund bears the character of a trust, the United States will, after collecting it, give to it the direction required by the trust.

As to the proposition of defendant's counsel, that the war of the United States was not against the insurgent government of Virginia, and that the overthrow of that government was not a conquest, but only the setting aside of one government and the assumption of its functions by another, it can hardly find acceptance in view of the facts of history. The event happened at the close of a frightful war, and was directly produced by arms, and by armies in the field. The power of the United States was directed against the insurgent State governments, even more than against their confederated authorities. The war was conducted for the overthrow of those governments. When *they* were crushed, the war ceased, and the historical fact of conquest cannot be changed or obliterated by the employment of theoretic paraphrases in speaking of it. As to the insurgent State governments, it was a conquest, and was followed by the legal results of conquest. This debt is due. It is due to some rightful claimant, and I think the law makes it sufficiently apparent who that claimant is.

The demurrer must be overruled.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia,
September, 1875.*

SALMON & HANCOCK v. RUSH BURGESS, COLLECTOR OF
INTERNAL REVENUE.

The fiction of law requiring a statute to be construed as in force during the whole of the day on which it passed, is a rule of mere convenience, and must give way when the priority of different events comes in question, and the right and justice of the case require.

An act of Congress increasing taxes and denouncing penalties, falls within the provisions of the first article of the National Constitution prohibiting *ex post facto* laws, and giving effect to statutes only from the time of their receiving the President's signature.

The proviso in the Act of March 3d, 1875, entitled "An Act to protect the Sinking Fund and providing for the exigencies of the Government," declaring that the increase of tax on tobacco therein provided for shall not apply to tobacco on which the tax had been paid when the act took effect, refers to the hour of the day on which the President's signature was affixed, and not to any antecedent part of the day.

THIS action is heard now, by consent of counsel, on the facts as set forth in the declaration, and on the general demurrer filed by the district attorney.

Wm. P. Barwell, for the plaintiffs.

L. L. Lewis, U. S. Attorney, for the collector.

The declaration, embracing several counts, sets forth in substance that, as to 9445 pounds of tobacco manufactured by the plaintiffs, they had before 3 o'clock P.M., of the 3d of March, 1875, purchased stamps of the proper officer, at the rate of 20 cents a pound, and affixed them to boxes of tobacco duly cancelled, and shipped the boxes from their factory, and thereby parted with all property in or control over the tobacco; that until 5 o'clock P.M., of the same day, the collector of internal revenue at Richmond, Rush Burgess, the defendant, had received of the plaintiffs and of tobacco manufacturers generally, 20 cents a pound for stamps on tobacco, and issued the stamps at that rate, doing so under express instructions from the Commissioner of

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Internal Revenue at Washington, directing him to continue to do so until otherwise instructed; that these instructions continued in force until 5 o'clock P. M., of the said 3d day of March, 1875, and were at that hour revoked; that 20 cents per pound was the tax required to be paid by the law, at the time when the plaintiffs stamped and shipped the said 9445 pounds of tobacco; that the act increasing the tax from 20 cents to 24 cents, entitled "An Act to protect the Sinking Fund and provide for the exigencies of Government," was not signed and approved by the President of the United States, until 9 o'clock P. M. of the said 3d of March, 1875; that some time after the said last-mentioned date, the said collector applied to and collected from the plaintiffs an additional four cents a pound on the said 9445 pounds of tobacco, amounting to \$377.80; that the plaintiffs paid this additional amount under protest, and appealed against it to the Commissioner of Internal Revenue at Washington; that the said appeal was denied by the said Commissioner, and that in consequence of this denial, and of the wrongful collection by the defendant of the additional amount of \$377.80, which has been often demanded, and payment thereof and of any part thereof refused, the plaintiffs now bring this action.

The suit was brought in the Circuit Court of Richmond, and has been removed into this court by *certiorari*; some half dozen suits at law involving the same facts and questions of law are pending which, it is agreed on both sides, shall await the result of this suit.

The case is heard upon the general demurrer of the defendant, which of course confesses all the facts that have been above recited. The act of the 3d of March, 1875, which is averred to have been signed and approved by the President at 9 o'clock P. M. on that day, enacts in its second section as follows:

"That section three thousand three hundred and sixty-eight of the Revised Statutes be, and the same is hereby amended by striking out the words 20 cents a pound and inserting in lieu thereof 24 cents a pound; . . . *Provided*, That the increase of tax herein provided for shall not apply to tobacco on which the tax under existing law shall have been paid when this act takes effect."

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HUGHES, J.—The question for decision is, whether the court can take notice of fractions of a day, and consider the act of March 3d, 1875, increasing the tax on tobacco four cents on the pound, as having “taken effect” at 9 o’clock P.M. on that day, according to the fact as admitted in the pleadings and according to the apparent intention of the proviso of the act; or, whether it is bound by a fiction of the law, which gives a statute efficiency throughout the day on which it is enacted, to construe the statute as having been in force throughout the 3d day of March, 1875. Another fact conceded in the pleadings is, that express instructions have been received by the collector in Richmond, from the Commissioner in Washington, to continue to receive as the tax and issue stamps for tobacco at the rate of 20 cents per pound on that day, and that throughout the business hours of the day those instructions remained in force, and were not revoked until 5 o’clock P.M.

Fictions of law are intended merely for convenience, and are now never enforced in prejudice of the right and justice of a case. *Fictio juris neminem ledere debet.* Many fictions of law which were observed in former times are no longer enforced. It was formerly, for instance, a fiction of law that an act of Parliament, passed at any day of a session, related back to and became a law as of the first day of the session, if the time for its taking effect were not mentioned in the act itself. A similar fiction was observed as to judgments at law, which were held to relate back and bear date as of the first day of the term of the court at which they were rendered. As to the fiction relating to statutes, it was never abrogated in England until the act of 33 Geo. III, ch. 13, when it was enacted by Parliament that each act should take effect from the day of its passage, or the day mentioned in the act itself. But this statute was not passed until 1793, and was never in force in the thirteen colonies. It is presumed that most of the States of the Union passed laws similar to the act of George III just mentioned. Be that as it may, we have to do in the present case only with a law of Congress; and the Constitution of the United States embodies provisions restricting the operation of acts of Congress to the time of their passage. Article first of that instrument contains two provisions, one of them disabling

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Congress from passing any *ex post facto* law; and the other declaring that, before a bill shall become a law, it shall have been presented to the President, and either signed by him or passed over his veto by two-thirds of both Houses of Congress.

In point of fact, this approval and signing, by the President, of the act of Congress now under consideration, as conceded in the pleadings, did not occur until 9 o'clock P. M. of the 3d of March, 1875, several hours after the close of business in Richmond on that day, and after the tobacco in question had passed from the plaintiffs' control. The question here is, not between different days, as was the question in the cases of *Arnold v. The United States*, 9 Cranch, 104, and of *Matthews v. Zane*, 7 Wheat., 164; for counsel on both sides concede that it went into effect on the 3d of March, 1875. But the question here is upon fractions of the same day. It is a fiction of law, applied for convenience, that there are no fractions of a day; but is this fiction to be enforced in spite of the fact admitted upon the record, against express provisions of the Constitution of the United States? The cases just cited decide that a law of Congress must go into operation on the day of its passage, rather than on a day subsequent, a proposition conceded by the plaintiffs. Every act does unquestionably take effect from the day of its passage or the day mentioned in the act itself.

The question behind the one decided in 9 Cranch and 7 Wheaton is, must every statute be held to cover the whole of the day on which it goes into effect? Is this fiction of law to be enforced in all cases, even when the statute, as in the present instance, itself provides that it shall not apply to acts committed before its taking effect?

It was conceded by the district attorney that the fiction of law in question does not apply to penal statutes. A penal law relating back a half day or a single hour, would be just as positively an *ex post facto* law as it would be if it related back a whole day, or a month, or a year. A penal law of Congress confessedly cannot be enforced against an act committed an hour before the bill making the act penal was signed by the President, though on the same day. It is claimed, however, by the district attorney that the rule is different in respect to remedial laws;

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which latter the law under consideration is not, it being a law imposing a tax and denouncing penalties for the non-payment of the taxes it imposes.

Such a concession as that mentioned would seem fatal, therefore, to the present defence; for this law of the 3d of March, 1875, must be construed in the same way as to all its features. Otherwise, we are reduced to the alternative of construing its penal provisions as having taken effect at 9 o'clock P.M. of a certain day, and its provisions not penal as having taken effect twenty-one hours beforehand, which construction would be absurd. The law is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 P.M. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions. Independently, however, of this latter consideration, the weight of authority seems to me to greatly preponderate in favor of the proposition that the courts may consider fractions of the same day in enforcing statutes.

In *Wrangham v. Hersey*, 3 Willes, 274, the court remarked:

"It is said there is no fraction of a day, but this is a fiction in law, *fiction juris neminem ledere debet*. . . . By fiction of law the whole term, the whole assizes, and the whole session of Parliament may be, and sometimes are, considered as one day, yet the matter of fact shall overturn the fiction, in order to do justice between the parties."

In *Combe v. Pitts*, 3 Burrow, 1433, Lord Mansfield said:

"Notwithstanding the general fiction of the whole term being but one day, yet when the priority of action becomes essential and necessary to be ascertained, the particular day must be shown. . . . But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so, too, where it is necessary, and can be done, for it is not like a mathematical point which cannot be divided."

Judge Kent says, 1 Commentaries, 455:

"It cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law as to all cases of crimes and penalties, and in every other case relating to contracts or property it would be against every sound principle."

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In re Ankrim, 3 McLean, 285, Justice McLean, of the Supreme Court of the United States, said in Circuit Court:

"It is unaccountable that the construction (that every statute begins to have effect, unless a time for its commencement is therein mentioned, from the first day of the session of Parliament in which it is made) should have been continued by the English courts down to the year 1772. Nothing could show more forcibly with what pertinacity enlightened judges adhered to an established construction of the statutes. This is not objectionable where no injustice is done to private rights. But where the law was made to have a retrospective effect, even to the forfeiture of life, it is a reproach to the tribunals of justice. In our government such a statute would be *ex post facto*, and in violation of the Constitution of the United States. The injustice of this construction in regard to civil rights is equally clear, except where the provision is of a remedial character. . . . That to notice a fraction of a day would be productive of inconvenience is readily admitted. In most cases, where no rights are impaired by the statute, there could be no ground of complaint. But suppose a legislature should make a certain act a capital offence, and the law should take effect on the day of its date, could an individual be punished under it for an act done on the same day, but before the statute was in fact passed? If in such a case an individual could be punished, it would be in virtue of a fiction of law, and there is no difference in principle in a fiction that shall give the statute a retroactive effect of half a day or half an hour. In the one case, as well as in the other, when the act complained of was done, it was innocent, but a statute subsequently passed makes it penal. And if punishment in the one case be inflicted, it may be in the other. The only difference is in time, not in principle. A rule of construction which leads to such a result, cannot be a sound one. Like many technicalities which have grown out of judicial action, the fiction is sustained neither by justice nor reason. . . . All who are acquainted with the history of legislative action in Congress know that bills passed on the 3d of March in what is called the short session, are signed by the President late in the evening of that day, and are not published until some days afterwards. But the repealing act in question provides that it shall not affect any case or proceeding in bankruptcy commenced before the passage of this act. Now suppose by a fiction the repealing law would take effect so as to include that day, still the saving goes to the passage of the act, and not to the time it took effect."

The decision of the court was, that fractions of the day could be considered, and that the statute did not take effect, as to the right of filing a petition in bankruptcy, until the actual time of its approval by the President.

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In re Richardson, 2 Story, 571, Justice Story said in Circuit Court :

"I am aware that it is often laid down that in law there is no fraction of a day. But this is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, like all mere legal fictions, is never allowed to operate against the right of the case. On the contrary, the very truth and facts in point of time may always be averred and proved in furtherance of justice, and there may be even a priority in an instant of time, or, in other words, it may have a beginning and an end. . . . So that we see that there is no ground of authority, and certainly no reason, to assert that any such rule prevails as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purpose of substantial justice. Indeed, I know of no case where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights *pro bono publico*. . . . In every case of a bill which is approved by the President, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval which makes it a law, and, until that act is done, it is not a law. The approval cannot look backwards and, by relation, make that a law which was not so before the approval, for the general rule is, *Lex prospicit, non respicit*. The law prescribes a rule for the future, not for the past, or, as it is sometimes expressed, *Lex dat formam futuris, non preteritis negotiis*. And this, in a republican government, is a doctrine of vital importance to the security and protection of the citizen. It is fully recognized in the Constitution itself, which declares that no *ex post facto* law shall be passed. . . . Surely the Constitution is not to be set aside or varied in its intendment by mere legal fiction. On the contrary, it appears to me that, in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide as to the time when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It may not indeed be easy in all cases to ascertain the very *punctum temporis*, but that ought not to deprive citizens of any rights, created by antecedent laws, vesting rights in them. In cases of doubt, the time should be construed favorably for the citizens. The legislature have it in their power to prescribe the very moment *in futuro* after its approval when a law shall have effect, and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect. But when the time can be accurately ascertained, I confess that I am not bold enough to say that it became by relation a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the Constitution."

Opinion of the court.

In *Pierrepont v. Graham*, 4 Wash. Ct. Ct. Reports, 240, Justice Washington said in Circuit Court :

“There is in contemplation of law no fraction of a day, unless when an inquiry as to a priority of acts done on the same day becomes necessary.”

In *re C. H. Wynne*, 4 B. R. R., 1, Chief Justice Chase said in Circuit Court at Richmond :

“Much was said in argument concerning the effect of the record of this deed upon the 2d of March, 1867, and it was strenuously urged that the deed was avoided by the effect of the (Bankruptcy) Act, which purports to have been approved on that day. But we entirely concur with Mr. Justice Story in thinking that, where the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. *Gardner v. Collector*, 6 Wallace, 499. And in this we think ourselves warranted by the reasoning of the Supreme Court.”

I find no decision of the Supreme Court of the United States directly in point on this question of the fraction of a day. But that court held, in the case cited by Chief Justice Chase, of *Gardner v. Collector*, 6 Wall., at p. 511, “On principle as well as on authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.” Here is at least an assertion of the right of the court to take judicial cognizance of the very time when a statute was passed.

The district attorney cited an opinion of the Attorney-General of the United States, published in 21 Internal Revenue Record, 90, to the effect that every act of Congress relating to revenue must be construed to embrace the whole of the day on which it becomes a law. I think the opinion of a preceding Attorney-General, published in 3 Opinions of the Attorney-Gen-

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erals, 82, is more in accordance with authority and reason. The Treasury Department was there advised :

“That a law of Congress which contains no provision as to the time when it shall take effect, commences and takes effect, as a law, from the moment it receives the approbation of the President, and that, as a general rule, it is not competent to go into the division of a day. But this rule is not universal, and when questions of right growing out of deeds, judgments, and other instruments bearing the same date are concerned, the precise time is allowed to be established. If it be true, in point of fact, that the act of the 3d March, 1835, did not receive the President's signature until after office hours on that day, then a right had been acquired by Major Hunt, which ought to be protected, and for that purpose I am of opinion, in analogy to the excepted cases just alluded to, that the precise time may be inquired into. This is also necessary, in order to prevent the law from operating retrospectively for a part of the day on which it commenced.”

The only cases which have been cited in support of the proposition that fractions of a day cannot be considered by the court, and that every act of Congress not penal must be construed to relate back to the beginning of the day on which it was signed by the President, are those of *In re Wellman*, 20 Ver., 653, also reported in 7 Law Reporter, 25 ; *In re Howes*, 21 Ver., 619, also reported in 6 Law Reporter, 297 ; and *United States v. Williams et al.*, 1 Paine, 261. The first two cases were decided by District Judge Prentiss, who sustained his view by a very able opinion, chiefly based on the grounds of convenience and necessity. The other case was decided by Justice Livingston sitting in circuit court. The weight of authority so greatly preponderates against these decisions, and, I must add, the weight of argument also, that I feel constrained to be governed by the decisions of Judges Mansfield, McLean, and Story, which I had previously cited.

The fiction of law must give way in this case to the facts of the record, and I must hold that the amendatory act of 3d March, 1875, increasing the tax on tobacco, did not relate back and cover any part of that day anterior to the hour when it received the signature of the President. The demurrer must be overruled.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia,
at Richmond, April, 1877.*

**E. J. WARREN *et als.*, TRUSTEES OF THE DOLLAR SAVINGS
BANK, v. A. W. GARBER.**

Under Section 18 of the Revised Statutes of the United States, in a suit brought by an assignee in bankruptcy after the passage of the act of June 22d, 1874, amending the Bankruptcy Act, to recover back money paid before March 14th, 1874, in violation of Section 5128 of the Revised Statutes, it is sufficient for the declaration to lay the payment as made within *four* months of the bankruptcy instead of *two* months; and to charge that the defendant *had reasonable cause for believing* that the payment was made in fraud of the provisions of the bankruptcy law, and it need not charge that the defendant *knew* that it was so made.

Under the general money counts in such a declaration, evidence will not be admitted to prove any liability, on implied promises, contract, or obligation, arising exclusively under Section 5128 of the Revised Statutes.

When a petition in bankruptcy is filed at 9 A.M., on the 14th March, 1874, *held*, that a preferential payment made on the 14th November, 1873, must be construed as made more than four months before the bankruptcy.

James Neeson and Thomas G. Jackson, for plaintiff.

John A. Meredith and John B. Young, for the defendant.

The first count in the declaration was as follows :

“And thereupon the said plaintiffs say that heretofore, to wit, on the 23d day of September, 1873, the said Mutual Building Fund and Dollar Savings Bank suspended payment, and has not since said day resumed payment; that said Mutual Building Fund and Dollar Savings Bank was adjudicated a bankrupt by the District Court of the United States for the Eastern District of Virginia, on the 26th day of March, 1874, upon the petition of A. Cappell & Co., creditors of said Mutual Building Fund and Dollar Savings Bank, filed in said District Court on the 14th day of March, 1874, and that by legal proceedings had thereon, the plaintiffs were by said court appointed and confirmed trustees in bankruptcy of the estate and effects of

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said Mutual Building Fund and Dollar Savings Bank, and the legal title to the estate and effects thereof was vested in them, that said Mutual Building Fund and Dollar Savings Bank being insolvent *within four months* before the filing of the petition aforesaid, with a view to give a preference to the said A. W. Garber, a creditor of the Mutual Building Fund and Dollar Savings Bank, paid to him, the said A. W. Garber, out of the funds of said Mutual Building Fund and Dollar Savings Bank, a large sum of money, to wit, \$4412.90, the said A. W. Garber then *having reasonable cause to believe* the said Mutual Building Fund and Dollar Savings Bank to be insolvent, and that said payment was made in fraud of the provisions of the Bankrupt Act, thereby preventing said sum of money from coming into the hands of the plaintiffs to the damage of the plaintiffs."

It will be seen that the declaration was based upon Section 5128 of the Revised Statutes as it stood before the amendment of June 22d, 1874. That amendment changed the period within which a preferential payment, etc., contemplated by it should be made to *two months* instead of *four*; and made it necessary for the person receiving the benefit of the preference to *know* that it was in fraud of the provisions of the Bankruptcy Law, substituting the word *know* used in this connection for the words *having reasonable cause to believe*.

The *second* count of the declaration was similar to the first as to the use of *four months* in its recital, but charged that the defendant *knew* that the payment was in fraud of the provisions of the Bankruptcy Act.

The *third* count was the same as the *first*, except that it mentioned in detail certain sums paid (parts of the gross sum of \$4412.90) instead of mentioning the gross sum.

The *fourth* count was like the *second* one, but differed from it in mentioning detailed payments instead of the gross sum of \$4412.90.

Then were added the usual general money counts, without any introductory recital of incidental facts bringing the assumpsit within the terms of section 5128.

There was a demurrer to the declaration, which was accompanied by the following memorandum of the grounds of law relied on :

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"1st. The first count of said declaration does not aver that the said sum of \$4412.90, alleged therein to have been paid to said defendant, was paid to him within two months before the filing of said petition, nor does it aver that the defendant 'receiving such payment,' received it 'knowing such payment was made in fraud of the provision of the Bankrupt Law.'

"2d. The second count of the declaration does not aver that the said sum of \$4412.90, alleged therein to have been paid to the defendant, was paid to him within two months before the filing of said petition.

"3d. The *third* count does not aver that the said several sums of money, therein alleged to have been paid to the defendant, were paid to him within two months before the filing of said petition; nor does it aver that the defendant, 'receiving such payments' received them, 'knowing such payments were made in fraud of the provisions of the Bankruptcy Law.'

"4th. The *fourth* count does not aver that the said several sums of money therein alleged to have been paid the defendant, were paid to him within four months before the filing of this petition [this objection was not true, as there was an averment of this fact]; nor does it aver that they were paid to him within two months before filing of said petition.

"5th. The 5th, 6th, 7th, 8th, 9th, and 10th counts in said declaration are the common counts in *indebitatus assumpsit*—in neither of said counts is it averred that at the time the acts there mentioned were done, and the indebtedness therein claimed accrued, that the bank was insolvent, or was in contemplation of insolvency, or that it was within four or two months before the filing of said petition, or with a view to give a preferment to said defendant, nor is it averred that said defendant had reasonable cause to believe the bank insolvent, or knew that they were done in fraud of the provisions of the Bankrupt Law.

"The declaration avers that at the time these payments were made, or acts done, the said defendant was a creditor of the bank, and that they were made before the filing of the petition; if so, they are valid, and there can be no recovery back in *assumpsit*. It is only when the payments are made under the circumstances specified in section 5128 of the act, that the payments are void, and can be recovered back by the assignee; and to enable him to do so, he must aver all the acts and circumstances specified in that section, as it is a statutory action. They are conditions precedent to his recovery, and must be averred in the declaration and proved in the trial.

"For the act expressly declares that the assignee may recover the property, or the value of it, from the person receiving it."

HUGHES, J.—The demurrant's objections to the declaration are founded upon two propositions, viz. :

1st. That section 5128 of the Revised Statutes is a penal law, or at least a law imposing a forfeiture; and

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2d. That it must, as such, be treated as if it had read before the 22d of June, 1874, as it has read since it was amended on that day, as to violations of it committed before the date of the amendment, and sued upon afterwards.

Neither of these propositions is true. Section 5128 is not a penal law, nor does it impose a forfeiture. It creates a disability. It imposes a liability in case its disabling provisions are violated. It establishes upon that liability a right. And it gives a remedy for that right.

The policy of the Bankruptcy Law being to distribute the assets of the bankrupt equally among his creditors, this section was inserted in aid of that purpose. As at common law an infant or a married woman could make no valid contract, so this section provides that insolvents shall not, within a defined period of their bankruptcy, be able to dispose of their property to persons who have reasonable cause to believe that they are insolvent, and are acting in contemplation of bankruptcy. If they do dispose of their property, under the circumstances defined by the section, the law declares that the transaction is void, and authorizes their assignees in bankruptcy to recover back the property so disposed of, or its value. If money be paid out by the insolvent under the circumstances detailed by the section, then the payment is void, the creditor who receives the money receives it under a void payment, which carries no title to him, just as the payment of money by a child to an adult person is a void payment, and an implied contract at once arises by which the person receiving the money becomes debtor to the person entitled to it, the law implying a promise on his part to return it.

Section 5128, therefore, has two distinct characters: First, it declares void, among other things, a preferential payment of money, and raises an implied promise or contract as of the date of the transaction on the part of the receiver of the money, to repay it. Second, it authorizes the assignee of the bankrupt who paid the money, to sue for and recover it. Only in this last respect is section 5128 remedial. Only in this last respect can an amendment of the law affect the rights which arose or were vested before the passage of the amending law.

On the other hand, that part of the section which defines the

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circumstances under which a payment shall be void, is declaratory and not remedial, creating a disability in the insolvent to pay within a certain period, creating a liability in the person receiving the money to repay it, making void the transaction, and doing all as of the date of the transaction itself.

Any payment by this bankrupt which was made within four months before the date of its bankruptcy, the 14th of March, 1874, under circumstances described by the law as it was during that period, was void, and void by virtue of the law as then in force.

It is very true on the general principles governing the construction of laws which have been amended, that where a penalty, forfeiture, or disability is imposed, and that disability is narrowed by the amending law, the amended is held to prevail over the original law. Sedgwick Stat. and Con. Law, 129, 130, and Cooley's Con. Lim., 381, and the numerous cases there cited. It is also true, that where a general clause of the amended law repeals all provisions of the original law inconsistent with those of the new law, as in this case, it is, in general, construed to have the effect to substitute the new law for the old, retroactively as to penalties, forfeitures, and disabilities. But while this is the case as to mere disabilities, it is not so as to such disabilities as are coupled with liabilities, out of which rights accrue to third persons, as in the case now before us. Here the disability to make a preferential payment within four months of the bankruptcy, imposed by the law upon the insolvent, was coupled with a corresponding liability of the receiver of the money to restore it, and an implied contract to restore it to a third person entitled, in equity, and upon principles of natural justice, to receive it.

Judge Dillon, in *Singer v. Sloan*, 12 B. R. R., 208, seems to have overlooked the distinction between a mere disability and a disability complicated with liabilities, and with resulting equitable and statutory rights. Notwithstanding the high authority of that eminent jurist, his decision in this case has been overruled in several cases subsequently decided, and I should not feel at liberty to follow it here even on general principles. See *Singer v. Sloan*, 11 B. R. R., 441, and 12 B. R. R., 208; *Kinker v. Van Dyke*, 11 Id. 308, and 14 Id. 112; *Barnewell v. Jones*, 14

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Id. 278; *In re Lee*, 14 Id. 89; *Oxford Iron Company v. Slafter*, Id. 381.

For if any doubt were left on this head, it would be removed by section 13, Revised Statutes of the United States, which applies to all laws of Congress, and which provides in express terms, that

“The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such liability.” The Revised Statutes were enacted on the 22d of June, 1874, simultaneously with amended Bankruptcy Act.

I hold, therefore, that those counts of the declaration are good which set forth the liability created by section 5128, as it was during the period four months before the 14th of March, 1874, which was the day of the filing of the petition in bankruptcy; they are sufficient in laying the payment sued upon within four months, and in averring that the defendant had *reasonable cause to believe* that the money was paid him in fraud of the provisions of the Bankruptcy Act. They need not lay the payment within *two* months, nor aver that the defendant *knew* that the payment was made in fraud of the provisions of the Bankruptcy Act. The demurrer, therefore, to the four special counts in the declaration is overruled.

As to the general counts, it is proper to say in advance, that while the demurrer to them is overruled, the court will not permit any evidence to be given under them at the trial, of a liability, contract, promise, or obligation arising exclusively under section 5128.

PROCEEDINGS AT THE TRIAL.

Thereupon the case went to trial, the plaintiffs having filed the following bill of particulars, setting forth the items claimed; the first two items being for money received by the defendant, on his checks drawn before the beginning of the period of four months preceding the bankruptcy; the remaining four items being for money received on checks drawn within that period:

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Bill of Particulars.

1873. Oct. 30.	To cash on your check of this date,	..	\$2616 72
Nov. 14.	" " "	..	517 01
Nov. 15.	" " "	.	133 10
Dec. 2.	" " "	..	1034 50
Dec. 2.	" " "	.	24 00
Dec. 4.	" " "	.	84 57

The petition in bankruptcy having been filed at 9 A.M. on the 14th March, 1874, plaintiffs raised a question whether the 14th November, 1873, was not part of the four months so as to include the check paid on that day. But the court ruled that that day should be excluded; first, because section 5013 expressly so provided; and second, because, on general principles, the law will presume that the payment was made while the person was competent to make it in cases of doubt.

Plaintiffs also contended that the president and cashier were not authorized to pay the two first checks to one depositor while the bank was unable to pay all depositors; but failed to show that these officers were forbidden to make such payments.

On the questions thus arising, the court gave the following instructions to the jury:

First Instruction.

The court instructs the jury that in order for the plaintiffs to recover back any payments made to the defendant within four months before the 14th of March, 1874, the jury must believe from the evidence—

1st. That the Mutual Building Fund and Dollar Savings Bank was insolvent at the time of the payment.

2d. That the bank made the payment with a view to give a preference to the defendant.

3d. That the defendant had *reasonable cause to believe* that the bank was insolvent.

4th. And that the defendant also had *reasonable cause to believe* that the payment was made in fraud of the provisions of the Bankrupt Act.

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The jury must believe that all this was so, or else they should not find for the plaintiffs as to any such payment.

Second Instruction.

The jury are further instructed that, in contemplation of the law of bankruptcy, insolvency consists in being unable to pay and not paying just and legal demands for money due and payable in the ordinary course of the debtor's business.

Third Instruction.

They are also instructed that before or on the 14th day of November, 1873, the president and cashier of the bank had a right to make *bona fide* settlement of the indebtedness of the bank with its assets as they thought best for its interests subject to the control of the board of directors; and that upon and prior to the 14th day of March, 1873, the bank had a right to make any *bona fide* payment to any of its creditors, whether the same was a preference or not, and that the acts of the cashier of the bank in any such payment while he occupied and filled, in fact, that office, are to be taken as the acts of the bank, unless they were forbidden by the bank, and such prohibition was known to the party receiving payment.

Fourth Instruction.

If defendant received money, or property converted into money or its equivalent, which he was not entitled to receive, either by fraud or from any one not authorized to give or deliver the same to him, which was the money or property of the said bank, though it was more than four months before the filing of the petition in bankruptcy, the plaintiffs may recover the same or the value thereof in this case and on the common counts.

The jury found a verdict for the plaintiffs in the sum of \$1276.17, the amount of the payments made within four months.

Statement of the case.

*Circuit Court of the United States, Eastern District of Virginia,
at Alexandria, September 26th, 1876.*

WILLIAM SMITH v. DAVID TURNER.

The principle of *res judicata*, which applies only where there is an identity of the *thing* sued for, of the *cause of action*, of *persons and parties*, and of the *quality of the persons* for or against whom the claim is made, does not work an estoppel against the complainant in a suit where the last three conditions are wanting.

A decision of the Supreme Court of the United States, which held that the tax sale of a certain piece of land made by commissioners of the United States (which it assumed to be valid) carried to the purchaser the whole estate in the land free from incumbrances, does not prevent a person, who was not a party to the record before the court, from bringing suit against the purchaser of the land, for the purpose of contesting the validity of the sale which was the subject of the decision.

At a United States government's tax sale, made on the first day of March, 1864, at Alexandria, Virginia, David Turner became the purchaser and entered into possession of a lot of land and dwelling-house, on Royall Street in that city. The land was at the time charged on the land-book for 1860, kept under the laws of Virginia, to R. M. & J. M. Smith. Turner still holds possession of the property.

R. M. & J. M. Smith seem to have owned at the time, not the fee simple title in the estate, but only a rent-charge of \$224 per annum. But they, and those from and through whom they claimed, had held undisputed possession of the entire estate in the property since 1821. It is contended by Turner that their interest was in truth and in fact, by virtue of long possession and merger, the entire fee simple.

In February, 1867, J. M. Smith, survivor of R. M. Smith, who had died, sued out a distress warrant against Turner, for rent in arrears from November, 1861, for five years, amounting to \$1120. He proceeded upon the ground that his rent-charge was not affected by the government's tax sale, only the fee simple passing to Turner, the purchaser. The warrant was levied

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upon household furniture of Turner found upon the premises to the value of \$200. Turner replevied his property and contested the right of the distrainor in the County Court, and afterwards in the Circuit Court of Alexandria. In the latter court a jury found a special verdict which traced the history of the title of the land down from 1819 to the tax sale to Turner. Upon this special verdict the Circuit Court rendered judgment in favor of the distrainor. The case was carried by writ of error to the Supreme Court of Appeals of Virginia, where the judgment of the Circuit Court was affirmed. A writ of error was then taken out of the Supreme Court of the United States by Turner, and that court reversed the judgment of the State courts, and decided that there was nothing in the acts of Congress of June 7th, 1862, and February 5th, 1863 (relating to the collection of taxes in insurrectionary States), which requires the tax commissioner to hunt up the owners of land assessed with a tax, or to make the tax out of personal property of his, or which may be found upon the land; but that it was clearly a direct tax upon the land and upon all the estates, interests, and claims connected with or growing out of the land, that all this was forfeited to the United States on non-payment of the taxes, and passed by the sale to the purchaser, subject alone to the right of redemption, which the law allowed; that in that respect only was it a defeasible title, but in all other respects was perfect, complete, and entire; and that in this case, the sale being a valid one, the rent-charge of the defendant in error was cut off and destroyed by it.

The case of *J. M. Smith v. David Turner* (reported as *Turner v. Smith* in 14 Wallace, 553) ended, of course, with this decision.

But no notice had been taken in any of the proceedings which have been described of a deed of trust which in the year 1854 had been executed by R. M. & J. M. Smith to Benjamin H. Berry as trustee, to secure a debt due to Aquilla Glasscock, evidenced by several bonds, now amounting to some \$6500. These bonds were assigned by their holder to one William Smith as trustee, for the benefit of his children. This deed of trust conveyed to Berry the rent-charge of \$224, which has been mentioned, and all the interest in the lot on Royall Street derived

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by the grantors, R. M. & J. M. Smith, from those under whom they claimed and held possession.

In April, 1874, William Smith, as trustee for his children, to whom Aquilla Glasscock had assigned the bonds of R. M. & J. M. Smith, which have been mentioned, brought a bill in the Circuit Court of the city of Alexandria, to foreclose the trust deed of 1854, making David Turner, one Robinson (who had been substituted for Berry, who had died, as trustee), J. M. Smith, and the heirs of R. M. Smith, deceased, parties defendant. The claim of the complainant was based on the ground that the tax sale of 1864 was invalid, and gave no title as against the complainant to the purchaser, David Turner. The complainant alleges facts in regard to the sale identical with those which were presented in the case of *Tacey v. Irwin*, reported in 18 Wallace, 549, in which the Supreme Court had decided the tax sale invalid.

This suit of *William Smith v. David Turner* has been removed from the Circuit Court of Alexandria into this court by writ of *certiorari* sworn out by the defendant. The suit is resisted on the ground that the Supreme Court of the United States in *Turner v. Smith* has already determined against the rights of the complainant by deciding that the rent-charge of R. M. & J. M. Smith conveyed by their deed of trust was "cut off and destroyed" by the tax sale of 1st of March, 1864, and that the purchaser holds the property clear of all incumbrances.

Hunton & French, for complainant.

Francis L. Smith & Son, for defendant.

HUGHES, J.—The chief question is, whether the principle of *res judicata* applies here in bar of the rights of William Smith under the trust deed of 1854. He sues for one of the very "interests" all of which the Supreme Court has decided to have passed to Turner by the tax sale of 1864. This principle applies only in cases where these four things concur, viz.: 1st, where there is an identity of the *thing* sued for; 2d, where there is an identity of the *cause of action*; 3d, where there is an identity of *persons and of parties* to the suits; and 4th, where

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there is an identity of character or *quality in the parties* for or against whom the claim is made. (Bouvier's Law Dict.; title *Res Judicata*, and the numerous cases there cited.)

In the present case it may be conceded, that the first condition exists. But the rest do not. As to the second, the cause of action in *Turner v. Smith* was rent distrained for; while here the prayer is for a foreclosure of a mortgage of a rent-charge alleged to rest upon the land. As to the third condition, except the defendants, David Turner and J. H. Smith, none of the parties are the same as they were in *Turner v. Smith*. As to the fourth condition, in that case, J. M. Smith sued as owner of the rent-charge, while in this suit William Smith sues as beneficiary in a deed of trust, conveying the rent-charge and all the interests held by the grantors in the deed in the land in question. Thus, the cause of action, the parties, and the quality or character of the parties are all different in the two suits, and William Smith is not estopped from bringing this suit by the judgment against J. M. Smith in the suit of *Turner v. Smith*. He may sue, moreover, for another and better reason.

He certainly had rights in the lot on Royall Street, Alexandria, at the time of the tax sale in 1864. If that sale was invalid those rights still subsist. He is not bound by any judicial decision upon the validity of that sale rendered in a cause in which he was not a party. The Constitution declares that no person shall be deprived of his property, except by due process of law. If that tax sale has been declared valid, it has been declared so in a proceeding to which he was not a party, and he is in no manner bound by the decision. He has as much right to impeach that sale by judicial proceeding as if the suit of *Turner v. Smith* had never been brought. His right to sue is as good now as it ever was.

The other question in the case is, whether the decision of the Supreme Court in *Turner v. Smith* is not, as an authority in settling the principle of law on which it was decided, binding upon this court in this cause.

It would undoubtedly be so but for certain considerations about to be stated. In the case of *Turner v. Smith* the validity of the tax sale of 1864 was not contested and was admitted. That

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being a *concession* in that case, the Supreme Court decided only that by a valid tax sale, under the laws of the United States cited, the land which is sold passes to the purchaser clear of all incumbrances. The complainant in the present suit, however, raises no question as to what passes by such a sale, but contests the validity of the sale of 1864, and rests his suit upon the question of its validity. And not having been a party to the former suit, he is not bound by the concessions, admissions, omissions, faults, or blunders of the plaintiff in that suit, and the decision there is only binding here as to the principle there settled, and not as to any different principle of law not raised or passed upon there, but relied upon here as governing this case.

The question here being the validity of the tax sale of 1864, and the facts of that sale being shown in the evidence to be identical with those which existed in the tax sale which was passed upon by the Supreme Court in the case of *Tacey v. Irwin* (reported in 18 Wallace, 549), the complainant contends that this court is bound by the decision in *Tacey v. Irwin*, and not by that in *Turner v. Smith*.

In the case of *Bennett v. Hunter*, 9 Wallace, 326, the Supreme Court had decided that the owner of land assessed with a Federal tax was not bound to tender the tax due in person, but might do so by another, and that if, in consequence of the refusal of tax commissioners to receive a tax when tendered by a person other than the owner of the land, the land was forfeited and sold, such tax sale was invalid. In the case of *Tacey v. Irwin*, the Supreme Court held, that where the tax commissioners advertised, or gave out to the public, that they would not receive taxes from any but the owners of lands in person, then a tender by others than the owners was rendered useless and nugatory, and need not be proved, and that tax sales made of such lands were invalid and null.

The facts here being the same as they were in the case of *Tacey v. Irwin*, and the question of law upon these facts being the same, the decision there furnishes the law to this court of this case, and a decree must be given for the complainant.

*United States Circuit Court, Eastern District of Virginia, at
Norfolk, July and September, 1876.*

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL
BANK OF NORFOLK, v. W. H. MORRIS *et als*.

In the trial of a suit *at law*, brought by the receiver of a national bank against its stockholders, for a contribution of a hundred per cent. to meet the liabilities of the bank, under section 5151 of the Revised Statutes of the United States, no evidence was pre-ented to show that the bank was insolvent, or that it was so to the extent of a hundred per cent. of its capital stock; but the plaintiff, as to such liability, produced only a letter of the Comptroller of the Currency to the receiver, alleging that he had "determined that, in order to discharge the legal debts and liabilities of the bank, it would be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders."

Held, that the plaintiff was not entitled to recover, as no proof, established by legal evidence, had been presented at the trial, of the fact that the bank was insolvent, and insolvent to the extent of one hundred per cent. of its capital.

On motion afterwards for a new trial, based on the ground that the plaintiff's attorney had relied upon the language used by the learned justice of the Supreme Court of the United States, in his decision in the case of *Kennedy v. Gibson*, 8 Wallace, 498,

Held, that this was a sufficient ground for awarding new trial.

THESE were actions of *assumpsit*, and were heard together, the facts of all being the same.

L. L. Lewis, United States Attorney, for the plaintiff.

*Richard H. Walke, W. H. C. Ellis, and Harmanson & Heath,
for the defendants.*

Plea of *non-assumpsit*. By stipulation between counsel a jury is waived, and the issues of fact, as well as law, are submitted to the court.

HUGHES, J.—These suits are founded upon section 5151 of the Revised Statutes of the United States, which provides that:

"The shareholders of every banking association shall be in-

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dividually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares," etc.

At the trial of these causes, the only evidence presented by counsel for the plaintiff bearing on the point on which the cases turn, are: 1st, the comptroller's certificate of the organization of the First National Bank of Norfolk, with a capital stock of a hundred thousand dollars, dated the 23d of February, 1864. 2d. A list of the subscribers to the capital stock to that amount, among whom are the defendants in these suits, for the respective numbers of shares set forth in the declarations. 3d. A certificate of protest showing that the bank failed and suspended payments on the 28th of May, 1874. 4th. The comptroller's certificate, dated June 3d, 1874, of the appointment of the plaintiff as receiver of the bank, with power to act as such under the general banking law. 5th. Printed copies of the demand of the plaintiff upon the defendants for the amounts sued for, sent through the mail. 6th. The following letter from the comptroller to the receiver:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF CURRENCY,
WASHINGTON, August 13th, 1875.

SIR: Having determined that in order to discharge the legal debts and liabilities of the First National Bank of Norfolk, it will be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders owning stock at the date of the suspension of said bank, so far as the same can be done by legal proceedings. You are directed at once to institute such legal proceedings in the proper court, as may be necessary to enforce against each and every shareholder of said bank owning stock or any interest therein at the time said bank suspended, his or her personal liability as such stockholder, under the provisions of section 5151 of the Revised Statutes of the United States, and this order must be held to extend to all cases save those where, because of bankruptcy or apparent insolvency, such legal proceedings would be of no avail.

Very respectfully,

JOHN JAY KNOX,
Comptroller of the Currency.

GEORGE E. BOWDEN, Esq.,
Receiver First National Bank, Norfolk, Va.

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Except this letter, and the certificate of the protest of a single ten dollar note of the bank, made on the 28th of May, 1873, there is no evidence in the cause tending to show that the bank is liable for contracts, debts, or engagements of any sort, or to any amount beyond its assets.

In order to establish the liability of these defendants, it must appear from the evidence—1st, that the receiver is authorized to bring these suits; and 2d, that the bank owes “contracts, debts, and engagements” beyond its assets, requiring the contributions sued for from these shareholders. Of the authority of the receiver to sue, and to sue for the amounts for which these suits are brought, the certificate and the letter of the comptroller are sufficient proof. The Supreme Court of the United States has so decided in the case of *Kennedy, Receiver, v. Gibson et als.*, 8 Wallace, 498. At page 505, Justice Swayne says, “It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.” See also *Cadle v. Baker*, 20 Wallace, 650, to the same effect.

Of course, this decision is the law of the present case; and accordingly I am authorized to hold that the comptroller’s certificate of June 3d, 1874, is sufficient proof that the plaintiff is the receiver of the bank, and that his letter, dated 13th of August, 1875, is conclusive proof that the receiver had authority to sue in these cases. No stockholder can dispute that authority, and none of these defendants do dispute it. *Whether* to sue, *when* to sue, and for *how much* to sue, are matters for the exclusive determination of the comptroller, who directs the receivers according to

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his determination, and whose determination can be controverted or resisted by no stockholder of the insolvent bank.

But the United States attorney, who is counsel for the plaintiff, assuming that the comptroller's letter of August 13th, 1875, was proof, not only of the receiver's authority to sue, but of the fact that the bank owed "contracts, debts, and engagements" a hundred per cent. over and above its assets, and that the defendants were liable for such contracts, debts, and engagements to the amount of a hundred per cent. on the par value of their shares, presented no evidence whatever (unless this letter of the comptroller, not sworn to, be deemed evidence) of the fact that the bank owed debts of any sort, to any amount, for which the shareholders were liable, under section 5151 of the Revised Statutes, insisting that the decision in *Kennedy v. Gibson et als.* made the comptroller's letter of August 13th, 1875, conclusive proof of that fact, which the defendant stockholders could not controvert.

I cannot possibly assent to such a construction of that decision. That case turned wholly and exclusively upon the *authority* of persons and officers connected with the subject-matter, and not at all upon any question of *evidence* affecting the merits of the controversy.

The principal question in the case was, whether the receiver could sue before being directed to do so by the comptroller, and it was decided that he could not, and that he should allege in his bill or declaration that instructions to sue had been given. Another point decided was, that creditors of the insolvent bank cannot sue its shareholders for contribution under section 5151, and that the receiver alone can sue. The remaining point decided was, that although it was made by law the duty of the United States attorney to bring such suits, yet the receiver, by approval of the Treasury Department, might retain other counsel to bring and conduct them. No question but one of *authority to sue* was raised in the case, and, of course, no other point was decided.

What value the comptroller's instruction to the receiver possessed as *evidence* of the liability of the shareholders to contribute to the debts of the bank was not a point in the case, and, of course, was not decided. It is true that some of the expressions of the learned justice who delivered the opinion of the court seem

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to hold that the comptroller's instructions to the receiver to sue, and for how much to sue, are sufficient proof at the trial of the insolvency, or of the extent of the insolvency, of the bank over and above its assets, but even if those expressions were intended to bear such a construction (which I do not think they were), they are but *obiter dicta*, and, as such, can have no authority in the decision of the questions necessary to be decided in these causes.

Moreover, this *dictum* was predicated only of suits in equity brought by receivers of national banks. A court of equity may very well call in, from the stockholders of such a bank, even a greater contribution than might be actually necessary to meet its engagements, for, under the elastic practice in chancery, any surplus could afterwards be readily refunded to the stockholders.

But the judgment of a court of law is absolute, and the *dictum* under consideration was never intended to be applied in actions at law brought by these receivers.

It is a constitutional provision that no person shall be deprived of his property except by due process of law. Except in cases where property is taxed, or otherwise taken for public purposes, by due process of law is meant by suit in a court of justice, and upon judgment according to the law and evidence. In the present cases suit is duly brought, and the court is bound to render its judgment according to the law and the evidence. The law makes these defendants liable only for the debts of this bank which it may owe beyond the value of its assets, and there must be proof in these cases that its debts are a hundred per cent. more than its assets can meet. How is such a fact to be proved? Clearly it can only be proved by legal evidence, evidence taken under the usual tests, for instance, of the *oath*, and of *cross-examination*. Surely the "*determination*" of the Comptroller of the Currency, that the stockholders of this bank are liable to the extent of a hundred per cent. above its assets, however correct it may be in fact, is not legal evidence of the fact such as a court of justice must accept as conclusive and incontrovertible. Surely the Supreme Court of the United States could not have intended, in *Kennedy v. Gibson*, to hold that such "*determination*" is not only evidence, but conclusive proof, which the "stockholders can-

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not controvert." Congress has sometimes gone as far as to enact that the transcript of a public officer's accounts, certified to be taken from the books of the Treasury Department, shall be *prima facie* evidence of their correctness as against that officer, but it has never gone so far as to declare such evidence to be conclusive and incontrovertible. So the law of Virginia makes the signature of the maker of a promissory note, alleged in the declaration of the plaintiff to have been signed by the maker, *prima facie* genuine, but it nowhere declares that the genuineness of such a signature shall not be questioned or controverted. There is no law of Congress making the "determination" of the comptroller even evidence of the insolvency of a bank or of the extent of it, much less *prima facie* or conclusive evidence.

If this letter of the comptroller to the receiver were conclusive evidence against the defendants in these causes, not only as to the receiver's authority to sue, as he has done, but also as to the liability of these defendants for "contracts, debts, and engagements" of the bank to the extent of 100 per cent. on their shares, why resort to a court of law at all? Surely a court of justice is something more than a mere machine for obediently executing the foregone determinations of some other tribunal; something more than the registering office of the judgment of another branch of the government. Surely the court has higher functions to perform, in cases tried before it, than the ministerial duty of rendering such judgment as may be prescribed to it by subordinate officers of an executive bureau. If the mandate of the chief officer of a bureau at Washington were binding as to those matters submitted to a court in the trial of a cause which go to the very merits of the demand, why try it elsewhere than at the bureau itself?

It may be ever so notorious that this bank is insolvent to the extent of a hundred per cent. beyond its assets, and that the payment of its debts may require contributions from its stockholders to full one hundred per cent. on their stock; but courts and juries must be deaf and blind to all facts except those which are submitted to them in evidence. They are sworn to try and decide according to the evidence submitted at the trial; and facts of the

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widest notoriety, if not so submitted, not only cannot be considered but must be studiously excluded from consideration.

The comptroller's letter of August 13th, 1875, is conclusive no farther than as to the receiver's authority to sue, and as to how much he shall sue for. It proves nothing at all as to the extent of the insolvency of the bank, and as to the liability of the defendants on their stock. This liability must be shown affirmatively by some sort of positive evidence; it cannot be inferred from hearsay or from the mere fact that the comptroller has ordered suit for the par value of the shares of the defendants. As nothing but the comptroller's letter was offered in evidence, it is impossible for me to hold that the liability of the defendants has been proved.

As there was no evidence whatever presented at the trial, save this letter of the comptroller (itself not having the dignity of an affidavit) that this bank was bound for any contracts, debts, or engagements beyond what its assets could meet, no case is proved against the defendants. The court accordingly decides that upon the evidence submitted at the trial they are not liable as set forth in the declaration; and finds for the defendants in each of these cases.

These cases were further heard on the 2d September, 1876, on a motion of the United States attorney for a new trial. The ground of the motion was, that as counsel for the plaintiff, he had relied confidently upon the strong language of Justice Swayne, in the Supreme Court of the United States, used in delivering its decision in the case of *Kennedy v. Gilman*, 8 Wallace, 505, to the effect that the "*determination*" of the comptroller that suits should be brought against the stockholders of an insolvent national bank for a percentage on their subscriptions was conclusive against the stockholders as to their liability, and the extent of it, and incontrovertible; and therefore it was that he had not submitted evidence which was abundantly at his command showing that the First National Bank was in fact insolvent to the full amount of its capital stock; thinking it unnecessary to do so in view of the decision of the Supreme Court referred to.

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HUGHES, J.—This motion is of course addressed to the discretion of the court; and its success must depend upon the two considerations, 1st, whether substantial justice was done at the former trial; and, 2d, if not, whether that was the result of inexcusable negligence or other fault in the plaintiff or his counsel.

I suppose that it will be conceded that substantial justice was not done at the former trial. The allegation of the district attorney is, that he had full proof at command that the First National Bank of Norfolk is insolvent to the extent of a hundred per cent. of its capital stock beyond its assets. If so, and the law making its stockholders liable severally for that amount on their stock, substantial justice was not done in a trial in which that liability was not established by proof which was readily available.

The only remaining question, therefore, is, whether the district attorney's excuse for not producing evidence which he had at his command is admissible and sufficient; which is, that he relied upon the language used by the Supreme Court in *Kennedy v. Gibson*, 8 Wallace, 505, as dispensing with the necessity of proof. The language referred to, used by Justice Swayne, who delivered the unanimous opinion of the court, was this:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

I have already shown that this language, so far as the question of proof of the *liability of stockholders* as distinguished from the authority of the receiver to sue was concerned, was *obiter dictum*. But it was certainly calculated to mislead. If used by the judge of any inferior court, there would have been less excuse for relying upon it; but, used as it was by a justice of the Supreme Court of the United States, in pronouncing the unanimous opinion of that august bench, I feel bound to concede the

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validity of the excuse of the district attorney. See *Starkweather v. Loomis*, 1 Verm., 573.

I will therefore allow a new trial, and continue there these causes to the next term of the court.

At the second trial of the cases the proper proofs were submitted and verdict and judgment were for the plaintiff in all the cases.

*United States District Court, Eastern District of Virginia, at
Richmond, May, 1877.*

**THE TRUSTEES OF THE MUTUAL BUILDING FUND AND DOLLAR
SAVINGS BANK v. E. BOSSIEUX & BRO., AND OTHER LIKE
SUITS AGAINST OTHER DEFENDANTS.**

A rule of practice prescribed by a court of justice, is for the government of suitors, counsel, and officers of the court in the conduct of causes and proceedings; and though it controls these persons, it does not control the discretion of the court itself so as to deprive it of power to secure the trial of causes on their merits, on proper showing.

An act of the legislature which takes away this discretion from a court, and deprives it of this power, is more than a rule of practice, and affects the common law right of suitors to sue in the courts.

Section 914 of the Revised Statutes of the United States, requiring the United States courts to conform their practice as near as may be to the practice obtaining in the courts of the several States in which they are held, contemplates only those rules of practice which are merely such, and does not contemplate those enactments of State legislation relating to practice in the courts which deprive them of power to control the application of rules of practice according to their discretion.

The discretionary power of United States courts held in Virginia over proceedings at rules, is not limited by sections 2 and 52 of the 167th chapter of the Code of Virginia of 1873, pp. 1089 and 1097.

*James Neeson and Thomas G. Jackson for the plaintiffs.
John A. Meredith for the defendants.*

In these suits an order was made on the first day (2d April) of the present term of the court, directing that these causes be reinstated on the rule docket. They appeared from the record to

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have been dismissed from that docket at the July rules, 1876, for want of declarations.

Motion is now made (17th May, 1877, of the same term of the court) to set aside the order of the 2d April, on the ground that the motion to reinstate ought to have been made at the regular October term of 1876, and is now too late.

Although the declarations were filed at the adjourned term of the court, held next after the July rules, 1876, at which the suits had been dismissed for want of declarations, it seems that the clerk did not make up the causes for the docket of the October term, and that the counsel of plaintiffs were not aware of that fact until shortly before the April term, 1877, when they promptly moved that the causes should be reinstated at rules.

Counsel for defence, in moving to set aside and annul the order of April 2d, rely upon sections 2 and 52 of chapter 167 of the Virginia Code of 1873.

Counsel for plaintiffs rely upon *Nudd et als. v. Burrows, Assignee*, 1 Otto, 426; *Indiana and St. Louis Railroad Company v. Horst*, 3 Otto, 291; *The Palmyra*, 12 Wheat., 1; *Sibbald v. United States*, 12 Peters, 488; *Harris v. Hordman*, 14 Howard, 334; and *Bank v. Wistar*, 3 Peters, 431.

HUGHES, J.—These were suits at common law, and were brought to March rules, 1876, when they were each “continued for declaration.” At the April, May, and June rules, they were “continued for declaration.” At July rules they were dismissed for want of declaration, on the 31st of July, 1876, and on August 2d, 1876, the declarations were filed, the court being then in session.

Although the declarations were marked as filed, they do not purport to have been filed by leave of court. It is difficult to conceive how they could have been filed after dismissal of the suits, except by leave of court, given on application of the counsel for plaintiffs (himself one of the plaintiffs), who, as we all know, had been in a protracted illness.

I conclude that such leave was given, and will deny the motion now made on that ground, but I would deny it on other grounds.

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Section 918 of the United States Revised Statutes gives the United States courts authority to adopt rules and orders, directing (among other things) the taking rules, and making and entering up of judgments by default in vacation, and otherwise regulating their own practice.

And section 914 requires that the practice, pleadings, and forms and modes of proceeding in common law suits, shall be conformed by the United States courts, as near as may be, to the practice, pleadings, and forms and rules of proceeding existing in like causes in State courts of record.

Since 1872 this court has not, under section 918, adopted rules of practice conforming its own practice, pleadings, and forms and modes of proceeding to those of the State court. But section 914 is itself a general direction and authority on this subject, rendering any express adoption of rules of practice prevailing in the State courts unnecessary by this court.

The Code of Virginia, chapter 167, section 6, page 1089, requires the clerk to enter at rules a dismissal of any suit in which, after the lapse of three months after the defendant has been summoned, though he has not appeared, the declaration or bill has not been filed.

And the same chapter of the code (p. 1097), section 52, gives control to the court at its next term, over all proceedings in its clerk's office, during the preceding vacation, with power to reinstate any cause discontinued during such vacation, to set aside any proceedings at rules, correct any mistake therein, and make any order concerning the same that may be just. The question is, whether these two sections of the laws of Virginia, operating together, are not more than rules of practice, and such as would take away from the United States courts that discretionary power over the proceedings of its officers which they have been decided to possess by the Supreme Court in the cases cited by plaintiff's counsel.

Section 2 of this chapter of the code, it will be observed, is more than a rule of practice, intended to govern the officers of court. It is a rule depriving a citizen of a right enjoyed before this law was enacted. It is, therefore, when enforced, in conjunction with section 52, a rule of right, and seemed to have

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been relied upon as such by the defendant's counsel in argument. It may be said of every rule merely of practice, that it is for the government of the officers of court, and does not deprive a court of its discretion to modify the application of it for sufficient cause. Any law which takes away that discretion from the court ceases thereby to be a mere rule of practice. Though the plaintiff and his attorney (as in the cases at bar) may be prevented by unavoidable accident from filing their declaration within three months, this section of the Virginia Code requires that suit shall be dismissed at rule, and if not reinstated at the next term of court, makes dismissal final.

Having been dismissed by the clerk, section 52, of the same law, authorizes the court at its next term to reinstate the cause; but does not in terms prohibit the court from doing so at any subsequent term upon a proper showing. Now if this last section of the law be held by the State courts, as I believe they do, to be a statute of limitation, stringent in its meaning and purpose, and prohibitory upon the court after the expiration of the first term following the dismissal at rules, then section 2d is thereby made more than a mere rule of practice; it more than directs the methods, forms, and times of proceeding in a suit to be pursued by the officers of court; it takes away in many cases (like the one at bar) a right of action; it deprives the suitor of a right, and the court of its discretion in respect to the suit. It would deprive a United States court of a discretionary power over orders of dismissal, affirmed by the Supreme Court in the cases cited by plaintiff's counsel. As such it does not fall within the meaning of the 914th section of the United States Revised Statutes.

That section was not intended as more than a regulation of the practice in the courts of the United States.

By rules of practice are meant the rules prescribed for the government of the officers of court respecting the times, forms, and methods of orderly proceeding in a court; and I repeat that rules of practice are not superior to the discretion of a court, so as to deprive it of the power to secure the trial of causes on their merits.

A statute of limitation is more than a rule of practice. Sec-

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tion 2d of the chapter 167 of the Code of Virginia is a statute of limitation, and when enforced in connection with section 52 is more than a rule of practice.

It affects very important and very valuable rights of citizens in many cases. I feel authorized therefore to hold that it does not fall within the contemplation of the act of Congress of June, 1872, now incorporated into the Revised Statutes of the United States, as section 914.

Section 52 of chapter 167 of the Code of Virginia does not in terms prohibit a court at a later term than the one next following a proceeding at rules from correcting those proceedings for good and sufficient cause; but is construed to do so by the State courts. If it does, it is more than a rule of practice, and becomes a statute of limitation. As a statute of limitation it does not fall within the contemplation of section 914 of the United States Revised Statutes. I arrive therefore at the conclusion that this court is not bound by section 914 to enforce the two provisions of the Code of Virginia which have been mentioned, because they have the character of statutes of limitation. I feel authorized to treat the motion now made as addressed to its discretion.

If the suits which were reinstated on the rule docket by the order which this court made on the 2d of April, 1877, were allowed to stand as dismissed at the July rules, 1876, the right of action is lost to the trustees in bankruptcy of the Dollar Savings Bank under the limitation of two years put by law upon their authority to sue.

The court ought to prevent such a result if possible, and allow the causes which would be dismissed by default to be tried upon their merits.

The well-known illness of the counsel for the plaintiffs, who was himself one of the trustees, his filing his declaration by leave of court long before the commencement of the next succeeding regular term of the court, his belief that the cause had matured for regular hearing at the October term, 1876, and ignorance of their previous dismissal at rules, and all the circumstances of the case, are sufficient grounds, in my judgment, to warrant the court in its discretion in refusing the motion now

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made to the court by the defendant's counsel, to set aside and annul the order of 2d of April, 1877.

*District Court of the United States, Eastern District of Virginia,
at Norfolk, May, 1877.*

HARMANSON, ASSIGNEE, v. R. T. BAIN.

The filing of a plea of setoff, in a suit brought by an assignee against a creditor in bankruptcy, is not the maintaining of a suit at law "against the bankrupt," such as is forbidden by section 5105 of the Revised Statutes of the United States, to a creditor who has proved his claim in bankruptcy.

Even if it were, section 5073, relating to setoff, and section 5105 must be construed together; and where the bankruptcy court permits the assignee to bring suit in a common law court against a creditor who has proved his claim, it must be implied that that court *ipso facto* gave leave to the creditor at the same time to withdraw his proof of claim and to plead his offset in the common law suit.

Such a plea of setoff is not a "suit" in contemplation of section 5105.

If the creditor who has proved his claim fails, or is not allowed, to plead his offset in such a common law suit, and judgment goes against him for a debt against which he has an offset, the court of bankruptcy, having full power over such a judgment, is bound by section 5073 to offset it with the claim of the creditor at its proper value.

The words "*without offset*" in common use on the face of negotiable paper, do not defeat the operation of section 5073, have no value as between the maker and the payee, and as to them are to be construed to have the same meaning as the words "*without offset as against a holder by indorsement.*"

Where it was agreed between the maker of a negotiable note and the payee, that the note should be payable in greenback currency, and other debtors of the payee were in the habit of paying their notes in the payee's depreciated certificates of indebtedness, the rate at which the maker of the note may setoff such certificates held by himself against the payee is their market value at the time of the maturity of the promissory note.

ACTION of assumpsit.

The Portsmouth Saving Fund Society ceased business as a bank in 1862, in consequence of public invasion.

At the close of the war, in the summer of 1865, it resumed

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business only for purposes of liquidation, and its directors by resolution authorized its cashier to wind up its affairs as far as possible by setoff. From sales of property the society afterwards derived some funds in greenback currency.

With part of these greenback funds it afterwards discounted a promissory note for R. T. K. Bain, the defendant, with the understanding that it should be payable in greenback currency.

This note, with its renewals, matured on the 29th of August, 1870, its amount being then \$2434. Bain and the firm of Bain & Bro., of which he was a member, held at that time claims founded upon original deposits in the bank to a greater amount than the firm and each of its members owed the bank, whether on notes or claims susceptible to be set off or otherwise.

These deposits were then worth 75 to 80 cents on the dollar. For the reason that he or his firm held such deposits, this note of the defendant stood over unpaid until the 30th of April, 1872.

At this latter date, partly for a claim for deposits held since 1870, and partly for a claim as a depositor transferred on that day by Bain & Bro. to the defendant, the defendant was a creditor to the bank to the amount of \$2828.48, and was its debtor for the promissory note of \$2434 already mentioned.

A petition in involuntary bankruptcy was filed against the society on the 17th of June, 1872, and on the 28th of June, 1872, the society was adjudicated a bankrupt.

In its schedule of debts due to it, it itemized this debt of \$2434 due from R. T. K. Bain.

In the course of proceedings, that is to say, in April, 1874, R. T. K. Bain, the defendant, through his attorney in fact (who could not, under section 5078 of the Revised Statutes, legally prove for him as a resident creditor), proved his claim in bankruptcy as depositor for \$2828.48, and made no mention of the notes as an offset in the proof of claim.

Although it would seem that the defendant appeared by attorney in some of the meetings of the creditors in bankruptcy, and voted by attorney, yet there is no evidence that he recognized the acts of his attorney in fact. Indeed, the attorney in fact had no written power of attorney, and it is admitted that the defendant neither received nor demanded either of two dividends which

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have been declared to him as a creditor by the assignee and register in the bankruptcy proceedings.

It is supposed that the assets in bankruptcy will pay a dividend of fifty per cent. at least.

Without demand by the assignee, and without any refusal on the part of the defendant, to recognize the validity of the note for \$2434 due by him, the assignee, August, 1875, brought this suit against the defendant upon the note which has been mentioned, on the common law side of this court.

The defendant pleads his offset of \$2828.48, and the court allows his plea of offset to be filed.

James E. Heath and C. Duffield, for the plaintiff.

W. W. Old, for the defendant.

Counsel for the plaintiff rely upon section 5105, Revised Statutes of the United States, and upon *Russell, Assignee, v. Owen* (Supreme Court of Missouri), 15 B. R. R., 322, and *Brown v. Farmers' Bank of Kentucky*, 6 Bush, 198.

Counsel for the defendant rely upon section 5073, Revised Statutes, *Colt et als. v. Brown*, 12 Gray, 233; *Denman v. Royalston Bank*, 5 Cush., 194; 5 Rob. Prac., 998; *New Lamp Chimney Company v. Ansonia Brass Company*, 1 Otto, 656; *Dawner v. Eggleston*, 15 Wend., 51; *Lechrinere v. Hawkins*, 2 Esp. Ni. Pri. Rep., 626; *Elano v. Kerr*, 1 East. Rep., 375; and *Cornforth v. Rivett*, 2 Maule and Sel., 510.

HUGHES, J.—The promissory note of the defendant, having been returned by the bankrupt society in its schedules, and not having been disputed by the defendant, and the claim of the defendant intended as an offset to it having been proved in bankruptcy by an attorney in fact (whose action, although illegal, will not be disputed by the defendant unless technical use of it be made against him), all this having been done, the bankruptcy court had full jurisdiction, under the unqualified language of section 4772, to adjudicate the mutual rights of the assignee in bankruptcy and the defendant, upon the rule of setoff established by section 5073.

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The defendant did not, by any act of his own, render the suit at common law necessary. The bringing of that suit in another forum than the court of bankruptcy was the voluntary act of the plaintiff. The defendant as a creditor was standing upon his right of setoff in the bankruptcy court.

By proving his claim there he submitted it to the jurisdiction of that court, and secured it from defeat by the statute of limitations, and he has done no act to put the plaintiff to the necessity of resorting to the common law forum.

The plaintiff, by leave expressed or implied from the bankruptcy court, brought this suit on the common law side of the District Court; and it must follow, as a corollary, that by the same leave, express or implied, the defendant has been permitted to withdraw his proof of claim in the bankruptcy proceeding and to plead his claim as an offset in this suit.

If the court were not so to hold as to its implied leave to either party, the greatest injustice would be done the defendant, in first having permitted, if not invited, him to prove his claim in the bankruptcy court, and then using that fact in bar of a right which the law itself gives him to offset at a proper rate with that claim the debt he owes to the assignee.

Section 5105 was never intended to be used for such a purpose. Its object was to confine the creditor to one forum or the other in respect to his claim upon the bankrupt.

It must be construed in connection with section 5073 so as to allow him, if the assignee in bankruptcy should resort to any forum other than the bankruptcy court for the assertion of a claim of the estate against him, to use his counter claim there as a setoff. In *Catlin, Assignee, v. Foster*, 4 B. R. R., 540, so far was this principle carried, that a creditor who had proved his claim in bankruptcy which had been disallowed by the bankruptcy court, and who had failed to appeal under sections 4980 and 4981, was allowed to plead the claim so rejected as a setoff. In fact, the filing of a plea of setoff in a suit brought by an assignee in bankruptcy is not the "maintaining a suit at law against the bankrupt," such as is forbidden to a creditor who has proved his claim by section 5105.

As to the objection of the plaintiff's counsel, that the plea of

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setoff was not noted as filed by leave of court within two years from the appointment of the assignee in bankruptcy, that seems to have been merely a clerical omission.

But even if the plea of setoff had not been filed until this present hearing, the objection could not be allowed to prevail; because, when the bankruptcy court gave leave to the plaintiff to bring this suit, that leave implied a contemporaneous permission to the defendant to avail himself of the same right of setoff in the common law court under section 5073, which he had secured in time in the bankruptcy proceeding.

This question, however, is of little practical importance; for, even if in the common law court the defendant were debarred by section 5105 of the right of pleading his setoff, and judgment were to go against him for the amount of his promissory note, still, even in that case, the judgment being in favor of the assignee in bankruptcy, who is under the control of the court of bankruptcy, that court would nevertheless be bound to apply the rule of section 5073, and set this judgment and the defendant's claim off, the one against the other.

Dismissing, therefore, that branch of the case, I come to consider the more important question: What amount should be allowed the defendant in offset against the plaintiff's demand?

The extreme demand of the defendant is, to be allowed the full amount of his claim on account of deposits which he held against the society as of April 30th, 1872, viz., \$2828.48. The extreme demand of the plaintiff is, that defendant should be allowed only the amount of the dividend to which the claim of the defendant will be entitled in bankruptcy, say 50 per cent.

The plaintiff bases his proposition on two facts, namely, that the defendant agreed that his note should be payable in greenbacks, and second, that the note purports on its face to be payable "without offset."

I think from the evidence that the intention of the society and of the defendant was that the note should not be treated as payable in deposits at their par value, as other creditors of the society were allowed to do in paying off their indebtedness.

But it could not have been legally intended by either of the two parties, that in the event of a liquidation in court of the

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affairs of the society the defendant should not have the right to set off, against the note he owed payable in greenbacks, his own claim against the society at its just valuation. Some of the many authorities to this effect were cited by the defendant.

While the defendant, in my judgment, has not the right to a credit against this note of the full amount of his claim against the society, yet I am bound to allow him a proper percentage of that claim.

What that percentage should be, I confess I arrive at in a somewhat arbitrary way. It is conceded, that at the maturity of the note in August, 1870, and on the 30th of April, 1872, some ten weeks before the petition in bankruptcy was filed, the market value of the claim of the defendant was 75 to 80 cents in the dollar.

This was about the value of the deposits of the society (when sold in large amounts) down to the time when the proceeding in bankruptcy was about to be commenced, which proceeding naturally depressed the market price afterwards. I shall, therefore, on the principle that the defendant, having had no agency in, is in no wise responsible for the consequences of the bankruptcy proceeding, allow his offset at the rate of 70 cents in the dollar, and will give judgment on that basis.

As to the words *without offset* used in the body of the negotiable note, they are to be read as if they were *without offset as against a holder by indorsement*.

Their sole purpose and effect is to give negotiability and credit to the paper. They are not treated by the courts as having any effect between the maker and the original payee of the paper. They have no effect or value in this suit, and cannot be construed to nullify section 5073 of the Revised Statutes.

Statement of the case.

*United States Circuit Court, District of South Carolina, at
Charleston, May, 1868.*

UNITED STATES v. ALFRED HUGER *et al.**

An officer of the United States in an insurrectionary State of the confederate government, who had paid money of the United States to the confederate States during the war, under compulsion, without collusion, contrivance, evasion, or willingness, though actual force was not used to compel him to pay, is not responsible to the United States for its reimbursement, for the reason that the confederate government had been recognized as a belligerent by the United States, and because the official bond of the officer to the United States implied the obligation on the part of the United States to secure to the obligor such a condition of things as would render his fulfilment of his bond possible.

THIS was an action on a bond given by the defendant as postmaster of the city of Charleston. The suit was brought to recover a balance of \$5576.41, due the government at the time of the breaking out of the civil war, with interest. It appeared that Mr. Huger had been appointed by President Jackson, in 1832, that he had held the office from that time to 1861, and that he had satisfactorily performed all the duties enjoined upon him by law. It appeared further, that he had made considerable effort to turn over the property in his hands to the United States government, but that he had not been able to do so, except as regarded a small part thereof, and that he had finally, on demand, surrendered the balance to the Postmaster-General of the confederate government.

The case was argued by D. T. Corbin, District Attorney, for the government, and by Messrs. Porter, Campbell, Magrath, and Rutledge, for the defendant. The jury found for the defendant, under the rulings of the court, the nature of which will be sufficiently seen from the following extracts from the judge's opinion.

* This case was reported in the *American Law Review*, vol. ii, p. 782.

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BRYAN, J.—The cases cited in the books all having reference to a settled order of things, all having reference to the possible personal private delinquency, or want of care, or misfortune of the obligor, a condition of things anticipated as probable or possible, and therefore in the minds of the parties to the bond, I hold that the rulings of the Supreme Court can have no proper application to a class of cases wholly different, and that the party cannot be held to an engagement, not in the mind of either party, and in a condition of things not possibly anticipated by either party, in which one party could not possibly fulfil such engagement, and the other party could not give him any proper help to fulfil it, that is, that without any default on his part, and in the absence of a condition of things which rendered it possible for him to execute the bond, he shall be compelled to execute the bond. That condition of things was presented in a state of civil war, where the territory of which the defendant was a resident was held under the domination of a belligerent—the absolute domination of a revolutionary government struggling for its life, compelled to put forth every possible exertion of power, inevitably arbitrary, and unscrupulous from the very fact of its necessities, and alike unable and unwilling to brook opposition. It was in the very nature of things a military despotism, whose commands must unhesitatingly be obeyed, and in the light of the past, it is but truth to say, whose commands were so obeyed.

The great civil war from which we have emerged not only demanded despotic powers in the South, but almost equally despotic power in the United States. The great government which succeeded in this contest, that great government itself, with all its mighty resources, was compelled to resort to arbitrary power. Civil liberty was scarcely consistent with the struggle between the two governments. Both were essentially military at the time, drawing all powers to themselves, and compelled of necessity to act in an arbitrary manner, liberty itself being the inevitable sacrifice. It was in such a condition of military domination that the defendant in this case was called upon, as the only act which implicates him in this matter,—which I conceive could implicate him,—was called upon some time after its domination,

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and after the United States postal service had ceased, to report the amount of property of the United States in his possession. In my esteem, that demand was peremptory. It was a command to be instantly complied with, not a matter of parley. That command carried with it an expression of force which could not be resisted, could not be resisted any more than its cannon or bayonets, which left the party upon whom the demand was made no alternative but to yield. There was no refuge from the wrath of that government, there was no defence against its power. In my esteem, therefore, the defendant under these circumstances was in the position of one yielding to overwhelming and present force, not to a force that was speculative and distant, but present, certain, and instant, a force so great, inevitable, and overwhelming, that the display of cannon and bayonets could not have added substantially to its compulsory power. The attempt at resistance would have been simply an idle parade. The attempt at resistance would have been regarded, under the circumstances, as a question of power to be punished. The power dominant at that time was a jealous revolutionary power, which could not afford to deal as a well-settled government, which could not admit of debate, whose commands were peremptory, whose exactions could not be trifled with. I instruct you that the demand upon Mr. Huger for the public property of the United States by the confederate States was a demand that he could not dispute. It was a demand, coming to him under the circumstances, carrying a claim of authority which he had no means to dispute, and which he could not dispute.

You will have to scan the testimony in this case, and your prime duty will be to see whether Mr. Huger did any act which implies collusion, consent, or connivance with the confederate government, any act which indicates the intention or willingness to betray the United States, and put the confederate government in possession of this property. If you see in any portion of his conduct, if you see in any act of his, a voluntary yielding of this property to the confederacy, if in any act of his you see that which implies connivance, a collusion, a willingness to give up this property to the confederates, then he has been false to his trust. And I beg of you to search the case, and if you see in

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any portion of his conduct any act which implies a willingness to yield this property, and that in parting with this property to the confederate government he has not acted throughout upon compulsion, moral or physical, equal to the overwhelming force of necessity, then he has been false to his trust.

I am asked to rule thirdly, that said confederate States or government of which John A. Reagan was an officer or agent, was an unlawful combination of divers persons, citizens of the United States, engaged in unlawful insurrection and rebellion against the government of the same, and within the territory thereof, unlawfully usurping the powers of government, and as such it continued to be unrecognized as having any lawful existence till suppressed by the military power of the United States, hence neither said confederate government nor its officers or agents could originate any legal action or issue any order which the defendant, Alfred Huger, was bound to obey.

I instruct you that, in so far as that said confederate States was an unlawful combination of divers persons, citizens of the United States, engaged in unlawful insurrection and rebellion against the government of the same, and within the territory thereof unlawfully usurping the powers of government, and, as such, it continued to be unrecognizable as having any lawful existence, till suppressed by the military power of the United States, etc., I give the instruction, but do not give the conclusion, that is, that the officers or agents of the confederate government could not issue any order which the defendant, Alfred Huger, was bound to respect. I instruct you, the United States having conceded to the confederate States (so-called) the authority of a belligerent, the power incident to the authority of a belligerent was conceded to the confederate States, and they had such right to give an order, which it was not possible for the postmaster or assistant postmaster here to dispute. They had the authority of a belligerent, and it was not within the competency of the postmaster to dispute the regular exercise of that authority.

I am further asked to instruct you, that this is not strictly a case to which the common law of agency or bailment applies, but a case of contract between the United States government and the defendant as equal contracting parties, and that the rights of the

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one, and obligations of the other, at most, were only suspended, and not impaired, by the late war; that the war having ceased, and physical obstructions removed, the defendant must respond to the requirement of his bond. I instruct you that this bond implies, on the one side and the other, a condition of things which renders it possible for its execution on either part, that is, that the United States on its part shall secure to the defendant that condition of things in which it was possible for him to execute the bond, and, if it does not secure him that condition of things, then he is not to be held to an impossibility. He cannot be called upon to discharge an obligation which it was impossible for him to discharge, by a condition of things which put it out of his power to meet his obligation, and which the United States had left him helpless when the obligation was to have helped him. When the United States was unable to perform its own part, and was helpless to help him to discharge his obligation, he is not answerable for the failure to discharge that obligation. The obligation is at an end, and he is discharged.

Lastly, I am asked to rule that the surrender of the gold and postal envelopes belonging to the United States, by defendant, Alfred Huger, on the order of the agent of the confederate government, received by him through the mails, and which contained no threat or suggestion of compulsion, was not a surrender or yielding up of the government property under the pressure of irresistible force.

I charge you, gentlemen, that an order from a government essentially military, and from the nature of things a military despotism, was the expression of a force that could not be resisted, and as peremptory of necessity as if the bayonet were at his throat. It was a command which carried with it irresistible power. I would be understood as negating the instructions asked for by the district attorney emphatically. I think the negative of this instruction as ruling the very essence of the case, that is, that the defendant living on the soil in such a contest in which such powers were engaged, the one struggling for existence, and the other for the rescue of its rightful authority, the one contending for the establishment of independence, and the other for the re-establishment of rightful constitutional rule

Syllabus.

and national integrity. In such a tremendous contest a party beligerent making a demand upon any inhabitant or citizen on its soil, made a demand which carried with it the necessity of instant obedience, and the refusal to obey, which, if it did not bring harm to the party who might oppose it, would have promptly been executed by the government itself. I repeat, the execution of the demand, if not executed by the party himself, would be executed instantly by the government, and, if the property were not surrendered, it would be taken. The refusal to surrender would have been idle, certainly, and, at the same time, might have become dangerous.

*United States Circuit Court, Eastern District of Virginia,
at Alexandria, July, 1874.*

G. W. CUSTIS LEE v. AZRO CHASE.*

Under the act of June 7th, 1862, "for the collection of the direct tax in insurrectionary districts," etc., as construed in *Bennett v. Hunter* (9 Wallace, 326), a tender by a relative of the owner of the tax due upon, property advertised for sale, is a sufficient tender. And if the tax commissioners have, by an established general rule announced, that they will not, and a uniform practice under it refused, to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a relative, friend, or agent of the owner "went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person."

Precedent given of proceedings under the acts of May 9th and June 8th, 1872, section 2, pp. 89 and 332, vol. 17, Stat. at Large, and under Supreme Court decisions in *Bennett v. Hunter*, 9 Wallace, 326, *Smith v. Turner*, 14 Wallace, 553, and *Tacey v. Irwin*, 18 Wallace, 549.

* This case is reported as furnishing a precedent or form of the finding and judgment in this class of proceedings, and as possessing some historical interest.

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F. L. Smith, for plaintiff.

W. W. Willoughby, for defendant.

The finding of the court, and the judgment rendered, were as follows, and were based upon the late decision of the United States Supreme Court in the case of *Tacey v. Mary Irwin et als.*, 18 Wallace, 548.

The finding was agreed by counsel.

And now at this day, to wit, the 7th day of July, 1874, the issues of fact in this cause having been tried and determined by the court without the intervention of a jury, pursuant to a stipulation, in writing, duly signed and filed, the court makes the following finding upon the facts.

Long prior to December, 1867, George W. P. Custis was seized in fee of the tract of land in the declaration mentioned; and by his last will and testament, an office copy of which is herein inserted, did devise as follows, to wit:

"In the name of God, Amen. I, George Washington Parke Custis, of Arlington, in the county of Alexandria, and State of Virginia, being sound in body and mind, do make and ordain this instrument of writing as my last will and testament, revoking all other wills and testaments whatever.

"I give and bequeath to my dearly beloved daughter and only child, Mary Ann Randolph Lee, my Arlington House estate, in the county of Alexandria, and State of Virginia, containing eleven hundred acres, more or less, and my mill on Four-mile Run, in the county of Alexandria, and the lands of mine adjacent to said mill, in the counties of Alexandria and Fairfax, in the State of Virginia, the use and benefit of all just mentioned, during the term of her natural life, together with my horses and carriages, furniture, pictures, and plate, during the term of her natural life.

"On the death of my daughter, Mary Ann Randolph Lee, all the property left to her during the term of her natural life, I give and bequeath to my eldest grandson, George Washington Custis Lee, to him and his heirs forever, he my eldest grandson, taking my name and arms.

"I leave and bequeath to my four granddaughters, Mary, Anna, Agnes, and Mildred Lee, to each ten thousand dollars.

"I give and bequeath to my second grandson, William Henry Fitzhugh Lee, when he shall be of age, my estate called the White House, in the county of New Kent, and the State of Virginia, containing four thousand acres, more or less, to him and his heirs forever.

"I give and bequeath to my youngest grandson, Robert Edward Lee, when he is of age, my estate in the county of King William,

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and State of Virginia, called Romancocke, containing four thousand acres, more or less, to him and his heirs forever.

"My estate of Smith's Island at the capes of Virginia, and in the county of Northampton, I leave to be sold, to assist in paying my granddaughters' legacies, to be sold in such manner as may be deemed by my executors most expedient.

"Any and all lands that I may possess in the counties of Stafford, Richmond, and Westmoreland, I leave to be sold to aid in paying my granddaughters' legacies.

"I give and bequeath my lot in square No. 21, Washington city, to my son-in-law, Lieutenant-Colonel Robert E. Lee, to him and his heirs forever.

"My daughter, Mary A. R. Lee, has the privilege by this will of dividing my family plate among my grandchildren; but the Mount Vernon altogether, and every article I possess relating to Washington, and that came from Mt. Vernon, is to remain with my daughter at Arlington House, during said daughter's life, and at her death to go to my eldest grandson, George Washington Custis Lee, and to descend from him entire and unchanged to my latest posterity.

"My estates of the White House, in the county of New Kent, and Romancocke, in the county of King William, both being in the State of Virginia, together with Smith's Island, and the lands I may possess in the counties of Stafford, Richmond, and Westmoreland *counties*, are charged with the payment of the legacies to my granddaughters. Smith's Island, and the aforesaid lands in Stafford, Richmond, and Westmoreland, only, are to be sold; the lands of the White House and Romancocke to be worked, to raise the aforesaid legacies to my four granddaughters. And upon the legacies to my four *granddaughters* being paid, and my estates that are required to pay the legacies being clear of debt, then I give freedom to my slaves; the said slaves to be emancipated by my executors in such manner as to my executors may seem most expedient and proper; the said emancipation to be accomplished in not exceeding five years from the time of my decease.

"I do constitute and appoint as my executors, Lieutenant-Colonel Robert Edward Lee, Robert Lee Randolph, of Eastern View, Right Reverend Bishop Meade, and George Washington Peter.

"This will, written by my own hand, is signed, and executed the twenty-sixth day of March, eighteen hundred and fifty-five.

[SEAL.]

"GEORGE WASHINGTON PARKE CUSTIS.

"Witness:

"MARTHA CUSTIS WILLIAMS.

"W. EUGENE WEBSTER."

The said tract of land was devised to his daughter, Mary Ann Randolph Lee, during the term of her natural life, and on her death was devised to his eldest grandson, G. W. Custis Lee, the

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plaintiff in this case, and to his heirs forever; the said Mary Ann Randolph Lee departed this life on the 5th of November, 1873; said last will and testament was admitted to probate in the county court of Alexandria, Virginia, on the 7th day of December, 1857, as appears by the copy of certificate of the clerk of said court, as follows:

"At a county court held for Alexandria County, on the 7th day of December, 1857, the foregoing paper writing, purporting to be the last will and testament of George Washington Parke Custis, was produced in court for probate by Robert E. Lee, one of the executors named therein, and Cassius F. Lee was sworn as a witness, who deposed that he is well acquainted with the handwriting of George W. P. Custis, and that he verily believes the whole of said paper writing, together with the signature thereto, are in the genuine handwriting of said George W. P. Custis. Robert E. Lee, one of the executors named in the last will and testament of George W. P. Custis, qualified and gave bond with security according to law, the security having justified.

Teste:

"B. H. BERRY,
"Clerk."

On the 11th day of January, 1864, the said premises in the declaration mentioned were sold by the United States Direct Tax Commissioners for Virginia, appointed under the act of Congress approved June 7th, 1862, entitled "An Act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes," and amendments thereto.

The said property was sold by said commissioners as land liable to be sold under the provisions of the 7th section of said act, because the direct tax imposed upon said property by the act of August 5th, 1861, imposing a direct tax, had not been paid.

The property was purchased at said sale by George W. Chase, since deceased, leaving the defendant his sole heir-at-law, at the price of four thousand one hundred dollars, who received from said commissioners a certificate of sale, in the words and figures following:

(The certificate is omitted.)

Before the commencement of this suit, and prior to January 1st, 1874, under and by virtue of said certificate of sale, and as heir-at-law of G. W. Chase, the said defendant entered upon and now holds the said property.

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The said tax commissioners entered upon the discharge of their duties in the city and county of Alexandria, Va., in the month of June, 1863. On the 14th day of September, 1863, they fixed the amount of the said direct tax chargeable respectively upon the several lots and parcels of ground in said city and county, including the property in controversy in this cause.

On the 11th of September, 1863, they caused to be inserted in a newspaper published daily in Alexandria, Va., the following notice :

Notice to Owners of Real Estate.

"The undersigned commissioners hereby give notice that they will be ready at their office, corner of Washington and Prince Streets, Alexandria, on and after the 14th of September next, to receive the direct tax assessed and fixed by them on the lots and tracts of land in the city and county of Alexandria, under and by virtue of an act of Congress, entitled 'An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes.'

"Office hours from 8½ o'clock A. M. to 2½ P. M.

"JOHN HAWKHURST,

"W. J. BOREMAN,

"G. F. WATSON,

"Commissioners."

The said commissioners, in performing their duties under the said act of June 7th, 1862, did not, at any time or in any case, make or cause to be made any demand for the payment of the tax, either upon the owner or occupant of the property respectively liable therefor, or upon any person whatever, and they made no effort in any case, of any kind whatever, to collect said tax, before proceeding to a sale of the land, except the publication of the said notice of September 11th.

On the expiration of sixty days from the 14th of September, 1863, the said commissioners treated all of said property in said city and county on which the tax remained unpaid, as forfeited to the United States, and liable to sale under said seventh section of said act of June 7th, 1862, and they proceeded, from time to time, to advertise the same for sale accordingly.

Pending the advertisement of property for sale under the said

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seventh section, said commissioners, pursuant to a general rule adopted by them to that effect, invariably refused, in all cases, to receive the tax upon property so advertised, unless tendered by the owner in his own proper person, and notwithstanding the tender of the tax by an agent, relative, or friend of the owner, the commissioners, nevertheless, treated and sold the property as delinquent.

This rule and practice was established and followed by them, pursuant to instructions from some officer of the Treasury Department.

Applications were made to said commissioners by the agents and friends of absent owners to pay the tax upon advertised property and save it from sale; which applications, under the operation of said rule and practice, were uniformly refused by the commissioners.

No note, record, or memorandum of such applications was kept or made by the commissioners, though such applications were frequent.

The premises in the declaration mentioned were sold as aforesaid by the commissioners without the knowledge or consent of the said Mary Ann R. Lee or of the said plaintiff, both of whom were absent from Alexandria, and within the confederate military lines from May, 1861, until May, 1865, continuously, and were not within the said county during that time.

The amount of taxes, costs, and penalties due upon the said land at the time of the sale to the United States under the said act was forty-six dollars and ninety-seven cents, which, together with interest, costs, and expenses of sale, has been brought into court and deposited with the clerk of this court for the use of the United States, and the whole amount of which is seventy-six dollars and seventy-five cents.

Wherefore, it is considered by the court that the plaintiff do recover of the defendant the premises in the declaration mentioned, according to the finding of the court, and that he recover also his costs by him about his suit in this behalf expended.

RO. W. HUGHES,
Judge.

ALEXANDRIA, 7th July, 1874.

Statement of the case.

NOTE.—The tract of land mentioned in the foregoing case was devised by the following clause of General George Washington's will to Mr. Custis :

“Fourth. Actuated by the principle already mentioned, I give and bequeath to George Washington Parke Custis, the grandson of my wife, and my ward, and to his heirs, the tract of land I hold on Four Mile Run, in the vicinity of Alexandria, containing one thousand two hundred acres, more or less, and my entire square, number twenty-one, in the city of Washington.”

The tract was afterwards called by Mr. Custis, “Washington Forest,” but is known locally as the “Custis Mill Property.”

United States Circuit Court, Eastern District of Virginia, at Alexandria, April, 1877.

JOHN AVIL v. ALEXANDRIA WATER COMPANY.

Where shares in a corporation were sold by the United States marshal, under a decree of confiscation rendered under like circumstances to those condemned by the United States Supreme Court in *Windsor v. McVeigh* and *Gregory v. McVeigh*, 3 Otto, 274, 284, and the corporation had denied the purchaser's title, and that purchaser had sold the stock to the plaintiff,

Held, in an action of trespass on the case for value, that the corporation was not liable to the plaintiff for the stock or unpaid dividends, if his vendor's title was under a confiscation sale, and the corporation had denied its validity, and the plaintiff had had such notice of these facts before his purchase as should have put him upon inquiry.

ON the 14th day of May, 1864, ten shares of stock in the Alexandria Water Company, standing in the name of W. N. & J. H. McVeigh, citizens of Alexandria, but then within the lines of the confederate army, were sold under a decree of the United States District Court in a libel for confiscation which had been rendered under the same circumstances as those described in the cases of *Windsor v. McVeigh* and *Gregory v. McVeigh*, decided by the United States Supreme Court, and reported in

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3 Otto, 274 and 284. That is to say, the appearance and the answer of the claimant of the property libelled for confiscation, had been stricken out at the trial of the libel, and a decree of condemnation entered without opportunity being given to the claimant to make defence.

The purchaser of the stock at the United States marshal's sale of it was Wm. A. Duncan, of Alexandria County, Virginia, and a certificate of stock was issued to him by the water company as of the day of the marshal's sale. Dividends on the stock were paid to this purchaser, as they were declared, up to 1866; and dividends had accrued since to the amount of \$347.50. Since 1866 the company had denied the title of this purchaser to the stock.

On the 6th March, 1874, Wm. A. Duncan, by indorsement on the certificate of stock, had assigned these ten shares to John Avil, a citizen of Pennsylvania, his brother-in-law, and coupled with the assignment a power of attorney in blank to make the proper transfer on the books of the water company. Demand had been made upon the company for transfer by Avil, on the 23d April, 1874, and had been refused. Evidence going to show that Avil, at the time of and before he received the assignment of the stock from Duncan, knew the character of his title, was given to the jury; and it was proved that the consideration of the purchase was a note of hand, not yet paid, given by Avil to Duncan in a considerably less amount than the face or market value of the stock.

At the trial, the court instructed the jury that if they believed that W. A. Duncan's title was obtained through a confiscation sale that was not legal, in May, 1864, and that there had been a continual denial of the validity of Duncan's title by the defendant company since June, 1867, and that the plaintiff had such notice of this fact as should have put him upon inquiry as to the character of that title before purchasing the shares of stock in question, they should find for the defendant.

The jury returned a verdict for the defendant; and judgment was rendered accordingly.

W. Willoughby, for the plaintiff.

S. F. Beade, for the defendant.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, June, 1877.*

**J. W. GILBOUGH & CO. v. NORFOLK AND PETERSBURG RAIL-
ROAD COMPANY.**

Where coupon bonds of a corporation, transferable by delivery, were stolen, and were afterwards sold in the regular course of business to a *bona fide* purchaser, before they matured, for their market price, *Held*, that the title in them passed to the purchaser, as to the bonds and as to each coupon which had not yet become payable at the date of the sale, but did not pass as to the coupons which were past due.

James Neeson, for the plaintiff.

R. T. Daniel, Attorney-General of Virginia, for defence.

AMONG other like property stolen from the State Capitol of Virginia, on or about the 3d of April, 1865, at the capture of Richmond, were eight coupon bonds of the Norfolk and Petersburg Railroad Company, for \$500 each, dated the 1st of July, 1857, payable to bearer on the 1st day of July, 1870, with coupons at seven per cent., payable to bearer semi-annually, on the 1st day of January and July in each year. They had been held by the State in exchange for a like amount of her own bonds, which had been lent the company about the time of the date of the company's bonds. The theft of the bonds from the State was advertised in the newspapers of Richmond, and was published elsewhere at the time it was discovered. There are now attached to the bonds all the coupons which fell due between January, 1866, and July, 1870, inclusive, that is to say, nine coupons each. Two days before the maturity of the bonds, and of the last coupons, that is to say, on the 28th of June, 1870, these eight bonds were sold to J. W. Gilbough & Co., bankers and brokers of Philadelphia, by a person whom they did not know, calling himself D. M. Taylor, at the market rate of 79 $\frac{3}{100}$, then commanded by such bonds in New York, Philadelphia, and

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Baltimore. The purchasers had no knowledge of the theft which has been spoken of, nor were there any circumstances attending their purchase of these bonds, tending to put them on inquiry as to the validity of the vendor's title to them, except the fact that the person offering them for sale was a stranger to them, that eight coupons were overdue, and that the bonds themselves were within two days of maturity.

Action of covenant is now brought by J. W. Gilbough & Co. against the Norfolk and Petersburg Railroad Company, for the amount of the bonds, principal and interest, and this company disclaiming property in the bonds, the Commonwealth of Virginia, by her Attorney-General, has been allowed to assert her claim to them, and make defence to the action under section 1st, chapter 149, of the Code of Virginia.

HUGHES, J.—It is useless to pass upon any other question raised in the pleadings except the single one on which the case rests. That question is, assuming these bonds and their coupons to be commercial paper, payable to bearer, transferable by delivery, whether or not the admitted fact that they had been stolen invalidates the title of their *bona fide* holders by purchase at the market price of such bonds.

It is no longer a question that the bonds of corporations payable to bearer are negotiable paper, at all times after they get upon the market, up to the date of their maturity. This is an elementary principle of commercial law. Nor is there any doubt, since the decision in *Mercer & Co. v. Hackett*, 1 Wallace, 83, that the interest coupons of such bonds not yet due are also negotiable paper. It may also be assumed, as the settled law of this country, as it is of England, that a *bona fide* holder, for value, of negotiable paper, in the form of the bonds and coupons in this case, by purchase before their maturity, is entitled to recover his demand from the maker or obligor, even though his vendor obtained them by fraud, or theft, or robbery.

In general, the purchaser of personal property obtains no better title than that of his vendor, unless, in England, he purchase in certain markets overt. But, for the benefit of commerce, this rule is reversed in respect to negotiable paper, and the holder

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of such paper, though it has been stolen, has title to it if he himself came to it *bona fide* in the regular course of trade, and the burden of proof is upon the defendant to disprove the *bona fides* of his purchase. This principle is too thoroughly established by the decisions of the Supreme Court of the United States in *Murray v. Lardner*, 2 Wallace, 110, *National Bank of Washington v. Texas*, 20 Wallace, 72, and *Hotchkiss v. National Banks*, 21 Wallace, 354, to be questioned here; however strong our inclination may be to protect the State of Virginia from such a theft as these bonds were in part the subject of.

But clear as the principle of these decisions is, as to the principal of the bonds sued upon in this case, and as to the coupons which had not yet matured at the date of the plaintiffs' purchase, it is well-settled law that the eight coupons which were then past due were not such negotiable paper as falls within the scope of the principle. As to those overdue coupons, the plaintiffs took only the title of their vendor, who called himself Taylor, which was no title at all. See *Arents v. Commonwealth*, 18 Grattan, at pages 777-780, and numerous cases there cited by Judge Joynes.

Judgment may be entered accordingly.

*United States Circuit Court, District of North Carolina, at
Raleigh, 1792.*

UNITED STATES v. MAUNIER.*

An examination of a prisoner, made before his commitment, under impressions of fear, whether signed or not by him, cannot be read in evidence against him on his trial under indictment for murder on the high seas. An indictment for murder on the high seas need not state the length and depth of the wound which caused the death.

* From Francois-Xavier Martin's Notes of North Carolina Decisions, 79.

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INDICTMENT for murder on the high seas.

Mr. Attorney of the United States Hill offered to give in evidence the examination of the prisoner before his commitment.

Martin, for the prisoner, objected to this :

1st. Because the prisoner at the time of his examination was under impressions of fear.

2d. Because the examination was not subscribed by the prisoner.

1. The prisoner was a French sailor, and the murder with which he stood charged had been committed upon the high seas. On his landing in North Carolina he was taken up and committed to jail. From thence he was taken on the next day, brought into court in irons, and examined, without being informed that he was then under an examination and not on his trial. He understood not the English language, and no one informed him of what was passing. There was room to believe that he thought, when he was remanded to jail, that he had been tried, convicted, and condemned, for he asked a person who understood the French language on what day he was to be executed.

The counsel said although in the case of a person who had resided some time in this country, or in others in which the proceedings are carried on by jury, the objection would be frivolous, yet it must have weight in the case of a foreigner unacquainted with our laws and our language ; that what the prisoner had seen in court, except perhaps the confrontation of witnesses, was all that in familiar circumstances he would have seen in his own country had he been tried there, where sentence of death is not pronounced in court in presence of the prisoner, but read to him afterwards by the clerk in the dungeon.

2. The examination and confession subscribed by an offender before a justice of the peace is good and sufficient evidence against such offender. Gilb. L. E., 140.

The examination of Sterne and Boroski was, by the Chief Justice, refused to be read at their trial. (See St. Tr., vol. iii, p. 470.) And Serjeant Wilson, in his edition of Hale's Pleas of the Crown, vol. ii, p. 585, in notes, adds a query, whether the

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Chief Justice was not right in such refusal. For, by the opinion of some judges now living, the statute does not extend to the examination of the party accused unless he signed his examination, but only to the witnesses or persons accusing.

In *Vaughan's* case, Mr. Crauley having made oath that the examination was taken before Sir Charles Hedges, and signed by the prisoner, it was read. 5 St. Tr., 229.

In *Harrison's* case, the Attorney-General desired that the defendant's examination, taken before the Lord Chief Justice Brumpton, might be read, and the defendant having acknowledged the hand to be his that was subscribed to it, it was read accordingly. 7 Stat. Tr., 118.

In *Laver's* case, the prisoner's counsel said, and the Chief Justice granted, that this examination could not be read unless it was signed by him. 8 St. Tr., 474; 8 Mead, 89.

PATTERSON, J., thought the examination ought to have been signed by the prisoner.

SITGREAVES, J., said the first objection had much weight with him, and

Mr. Attorney of the United States withdrew his motion.

The prisoner was found guilty upon other evidence.

And it was moved in arrest of judgment, on the ground that the length and depth of the wound were not mentioned in the indictment.

The prisoner's counsel cited 4 Co., 42; *Haydon's* case.*

The court did not intimate that they had any doubt, but said if they had they would direct a copy of the indictment and reasons to be transmitted to the Supreme Court. *Curia advisare vult.*

The court directed the prisoner to be arraigned on another indictment which had been found against him.

Whereupon he pleaded not guilty, and the court ordered the trial to be proceeded on instantly.

And with some difficulty was prevailed upon to adjourn it to the succeeding Monday, it being Saturday.

An order was then made that the marshal send expresses to

* This reference is at fault; but is taken literally from Judge Martin's book.

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the grand jury (who had been discharged), commanding their immediate return.

On Monday following the prisoner was brought to the bar, as he and his counsel expected, to be tried on the second indictment.

But the court informed the bar they would take up the motion in arrest of judgment.

On the part of the United States several precedents of indictments were read out of West, in which the length and depth of the wound are not mentioned.

Martin observed that, in all the indictments (but one) in which the length and depth of the wound were not mentioned, the instrument had gone through the body of the person killed, some limb had been cut off, or the wound had been given with a blunt weapon. In this case the mortal wound was stated to have been given with an axe, on the head. That the authority in Coke was not only unshaken, but frequently recognized.

The court, however, overruled the motion, without making any observation, and passed sentence of death.

At the same time sentence was passed on three other men who had been included in the same indictment, and they were soon after executed.

This is the first time that judgment of death was given under the authority of the United States.

United States Circuit Court, for the District of Virginia, at Richmond, November, 1795.

UNITED STATES v. MUNDELL.*

It is not necessary that the name of the prosecutor in the courts of the United States should be written at the foot of the indictment.

In indictments for misdemeanors in the courts of the United States, the court, and not the jury, should assess the fine.

When a statute of the United States makes any provision upon a subject within the scope of the powers of the General government, the State laws upon the same subject cease to operate.

* This report is taken from 6 Call's Virginia Reports, p. 245.

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The existing statute of a State, applicable to any case at the time of the enactment of the act of Congress, which refers to the laws of the States as rules of decision, must be considered in the same manner as if the words of the State law had been adopted, and specially re-enacted by the act of Congress.

But such statute of the State must be completely applicable to the case, for if there be any part qualifying and modifying the rest, of which a party cannot have full benefit in the courts of the United States, this is not a case in which Congress have given authority to adopt such part, since the whole law is not applicable, as the authority refers to entire law, and not to parts, which themselves are qualified by other parts, not applicable to the United States.

The authority given to the courts of the United States, to regulate the forms of proceedings, when exercised, is as binding as if it had been a specific part of the court system established by Congress.

But the authority to demand bail is not of that description, and must depend upon some precise law.

Upon the principles of society, every person is bound, and has virtually agreed, to pay such sums of money as are charged on him by the sentence, or assessed by the interpretation of the law, and therefore, whatever the laws order any one to pay, that instantly becomes a debt, which he hath beforehand contracted to discharge.

The nature of the common and statute laws of the State, with alterations made in them by the Revolution, the Articles of Confederation, and the Constitution of the United States, considered.

A revolution does not abolish all laws and throw people into a state of nature, therefore the Declaration of Independence did not totally abrogate all laws subsisting before, but only such as became inconsistent with the new form of government.

The laws of the States in regard to that share of legislative power retained to themselves, remained unaltered by the adoption of the Constitution of the United States, and could only be changed by the States themselves, or by a treaty made within the legitimate objects of the treaty-making power.

The rule in England that the king is not bound by a general law, unless he be specially named, is confined to cases where he might otherwise be deprived of some personal or legal right, and not to provisions of general law arising from principles of public policy only.

Where a statute, with regard to process, is directory to the court or the clerk, and not to the sheriff, the latter is bound to obey the writ as he receives it, but as the indorsement of the true species of the action upon the writ is required by the act of Assembly, that the sheriff may see whether bail is to be demanded or not, he must be judge himself, and act at his peril.

Bail is not requirable in an action of debt for the penalty of a statute,

Therefore, where there were two writs of *capias ad respondendum* against the same defendant, one for the *penalty* of a statute, and the other for

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a *duty* on stills, and the marshal demanded bail upon both, which the defendant refused to give, and resisted the marshal, who meant to imprison him for want of bail, the resistance was lawful, and therefore an indictment against the defendant for that cause was not sustainable.

For although he was authorized to demand bail for the *duty*, he could not demand it upon the writ for *penalty*, notwithstanding the indorsement by the attorney for the United States.

For an indorsement, even by the court itself, unless in cases where they have a discretion, would not justify the marshal in requiring bail, where the act did not authorize it, because it would be altogether extrajudicial.

THE defendant was indicted under the act of Congress* for resisting the deputy marshal when serving two writs of *capias ad respondendum* upon him, to wit, one for eleven dollars and eleven cents for the duty due upon a still; and the other for two hundred dollars, for penalty alleged to have been incurred under one of the revenue laws of the United States.

Wickham, for the defendant, moved to quash the indictment, because the name of the prosecutor was not written at the foot of the indictment according to the directions of the act of Assembly, passed in 1786, which he said ought to govern in this case, agreeably to the provisions of the act of Congress, adopting the State laws,† as the statutes of the United States, which had made no provision for it.

Campbell, attorney for the United States, insisted that the act of Assembly was made for a purpose not applicable to this case, for that was intended to guard against the malice of individuals, who might attempt to harass each other without just cause, but this was a prosecution instituted by the attorney as part of his official duty, upon discovering that an offence had been committed against public justice and the authority of the United States.

The point was saved, and the jury sworn upon the plea of *not guilty*, when a question arose whether the jury, if they found the prisoner guilty, should assess the fine agreeable to the directions of the above-mentioned act of Assembly, or should merely declare him guilty, and leave it to the court to impose the fine.

* April, 1790, ch. 9, sec. 22.

† September, 1789, ch. 20, sec. 34.

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The court, doubting upon this point also, took time to consider both questions; and on the next day,

IREDELL, J., delivered the resolution of the court as follows:

It is extremely clear that it was not necessary, at common law, that the prosecutor's name should be written at the foot of the indictment; and although the act of Assembly requires it to be done, where the prosecution is at the instance of an individual, for the sake of rendering him liable for cost if he fails, that does not prevent the attorney for the public from preferring an indictment *ex officio*, or the grand jury from finding one of their own accord. For, besides the authority which the attorney had at common law, which is not taken away by the State statute, the act of Congress makes it his duty, if he sees cause, to prosecute, *ex officio*, "all delinquents for crimes and offences cognizable under the authority of the United States." Act September, 1789, ch. 20, § 35. And it is incident to the nature of the grand jury, to indict when they receive information of a crime. The latter was said to be a presentment merely, and not an indictment; but that is not strictly correct, for the difference between them is this: if the grand jury present of their own knowledge it is a presentment only; but if on knowledge of others, it is an indictment. Independent of that, however, the object of the act of Assembly was merely to provide for costs. But upon that subject Congress have acted themselves, and directed that the informer, if the prosecution fails, shall have the costs, without prescribing that his name shall be written at the foot of the indictment. Act May, 1792, ch. 36, § 5. And as the State statutes can be referred to only where the laws of the United States had not taken up the subject, nor made any provision concerning it, we think that the indictment ought not to be quashed. And upon similar principles we are equally clear as to the other point; for the act of Assembly is a general provision, applying to all cases, and leaves the fine indefinite, except that it is to be according to the degrees of the fault and the estate of the defendant; but the act of Congress provides for the very case itself, and declares the defendant on conviction, "be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars." Act

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Cong., May, 1790, ch. 9, § 22. So that Congress have not only taken up the subject, but have prescribed the limits to the punishment not to be found in the act of Assembly, which, consequently does not apply to the case. The common law practice, therefore, must be adhered to; that is to say, the jury are to find whether the prisoner be guilty, and if unfortunately that should prove to be the case, the court must assess the fine.

We should gladly have left the unpleasant service to the jury, but we are not at liberty to do so; for we are not to supply supposed omissions of Congress upon the grounds that they have not gone far enough, or to confer authority where they have not thought proper to confide it. We must administer the law as we find it, and, under that point of view, we should not be justified in relinquishing a jurisdiction vested in the court, and which it will be our painful duty to exercise.

Wickham insisted on the trial, that there was no resistance, for the deputy marshal had actually served the writ without obstruction; and the resistance was against being committed for refusing to give bail, which the deputy marshal was not authorized to demand, on the writ for the penalty, but would have been guilty of false imprisonment if he had committed the defendant upon it, because he refused to give the bail. In support of which he said that both by the common law and state Statutes, the defendant was not liable to be held to bail in an action for a penalty given by a statute. Act Ass., 1788, ch. 67, § 27. And as laws of the United States had made no provision upon the subject, the State laws must prevail.

Campbell, contra.

By the State practice the *capias* is the first process, and commands the sheriff to take the body, and have it forthcoming, which he must do at his peril, unless in cases of special exception by some statute, and there is none such here. Consequently, as the act of Congress directs that writs in the courts of the United States shall be like those of the States in similar cases (Act Cong., Sept. 1789, ch. 21, § 2), the defendant might have been lawfully held to bail.

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But some regard ought to be had to the situation of the officer, for the rule insisted on by the defendant's counsel would involve him in inextricable difficulties.

Wickham.—At common law the defendant was not liable to be held to bail in actions of this kind. The original process in actions of debt was a *præcipe quod reddat*; which, if the defendant failed to obey, the *capias* went in consequence of the disobedience; but that proving tedious, the *capias*, at length, went in the first instance, upon a feigned disobedience of the original. That presumption, however, was not made to the prejudice of the defendant, for bail was dispensed with upon the *capias*. 3 Black. Com., 287.

The writs were marked as follows: Upon that for penalty the indorsement is, "For a *penalty* under the act of Congress of the United States. Appearance bail required. Alexander Campbell, attorney for United States;" and upon that for the duty on the still the indorsement is in these words: "For duties on still unpaid. Appearance bail required. Alexander Campbell, attorney for the United States." The jury found the defendant guilty; but the verdict was to be subject to the opinion of the court whether the deputy marshal was authorized to demand bail.

Campbell.—When the sheriff arrests the defendant he must either take bail or commit the prisoner, or an action lies for the escape, 1 Bac. Ab., 205. At common law nothing but imprisonment would suffice, 2 Roll. Ab., 112; and notwithstanding the statute 23 Hen. VI, ch. 9, authorized the sheriff to take bail, yet the plaintiff was not bound to accept the bond, but might require the body to be produced upon the return day of the writ, 1 Vent., 55, 85; 1 Bac. Ab., 205; 1 Salk., 99; Stat. 4 Am., ch. 16, § 20, although the court would, upon motion, permit the defendant to give common bail, Boh. Inst. Leg., 48; 1 Bac. Ab., 209; 1 Salk., 100; Th. Raym., 74; 1 Ld. Raym., 767. The inflexibility of the rule will appear by a short review of the statutes of bail. By that of the 23 Hen. VI, cap. 9, the sheriff was authorized to take reasonable sureties, but if they were not given he was bound to commit. By that of the 13 Car. 2, ch. 2, § 2, the

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cause of action was to be inserted in the process, but still bail was to be demanded; and by that of the 12 Geo. I, ch. 29, the sum is to be indorsed upon the writ; but, if bail be not given, the sheriff must imprison, 3 Black. Com., 287, 288, 290. So that notwithstanding the *capias* in practice has long ago become the first process, 3 Black. Com., 282, the rule of the common law continues in force, and therefore the defendant must in every case give bail or go to prison.

Wickham.—There is no difference between us where the *capias* was either the first or second process at common law, for in both the body could always be required, and the authorities cited by the attorney prove nothing more.

But where the *capias* was not originally the first or second process, but became first by fiction of law, there a different practice obtained, unless the debt was verified, and the defendant was personally bound to pay it. Now a *capias* in debt could not issue, in the first instance, at common law; for, before the statute 25 Edw. III, the original process in that action was a *præcipe quod reddat*; and if that was disobeyed, a *capias*, grounded on the statute, followed, Fitz. Nat. Br., 263; 3 Black. Com., 280, 287; 3 Co., 11; 5 Co., 89; upon which the body might be required, as the contempt of the summons showed that a voluntary appearance was not to be expected. But when the *præcipe* fell into disuse, and the *capias* became the first process under color of an imaginary summons and contempt, the law, according to the rule in Liford's case, 11 Co., 51, that, *in fictione juris semper æquitas existit*, would not subject the defendant to inconvenience, upon the pretence of disobedience to a writ which had never issued; and therefore, unless there was a breach of the peace, or the debt was due from the defendant himself, and verified either by a specialty some sentence of the law or an affidavit, the defendant was not liable to be committed or bound to find sureties for his appearance, 3 Black. Com., 287; which is the reason why executors, heirs-at-law, and *femes covert* cannot be held to bail. It is not true, therefore, that the sheriff must in all cases obey the writ to its literal expression; for, although the *cepi corpus* is the proper return, he may add that John Doe and Richard Roe

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are the bail for appearance, and if he had done so in the case in 1 Ventr., 85, or had pleaded that the writ was a *capias* in the first instance, and that John Doe and Richard Roe were appearance bail, and got leave to amend his return accordingly, he would have been justified. Consequently, as there was neither a breach of the peace, a specialty, or an affidavit in the present case, the defendant was not bound to give bail or go to prison.

But whatever may be the rule in England, the question is completely settled here by the act of Assembly of 1788, ch. 67, which says that "in all actions to recover the penalty for breach of any penal law not particularly directing special bail to be given," the sheriff shall "be restrained from committing the defendant to prison or detaining him in his custody for want of appearance bail, but shall return the writ executed; and if the defendant shall fail to appear thereto, there shall be the like proceedings against him only as is directed against defendants and their appearance bail, where such is taken." This is decisive, as the act was made before the act of Congress adopting the State laws, passed, and therefore is embraced by it as effectually as if the very words were inserted in the Congressional statute.

Campbell, in reply: The act of Assembly had nothing to do with the case; for penal laws of a country are local to that country, and therefore those of Virginia, being local to Virginia, cannot bind the United States. Nor was it intended by Congress that they should; for uniformity of proceeding in all such cases was, and should be, the object. The man of Massachusetts should not, in this respect, be in one condition, and him of Virginia in another. *Our. adv. vult.*

On the 9th of December, 1795, IREDELL, J., delivered the resolution of the court.

After stating the case, he proceeded as follows:

The question is, whether, upon two *capiases* found by the special verdict, bail was requirable by the marshal.

I say upon two, because, if requirable upon the one, and not upon the other, the marshal ought to have made a distinction,

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and not demanded bail generally. It was for this reason the question was reserved as to both, and not as to either singly.

The only one upon which the doubt arises is as to the *capias* in debt for two hundred dollars, indorsed as follows, "for a penalty incurred under an act of the United States. Appearance bail required." Signed by the attorney for the United States for the district of Virginia.

The single question then is, "Whether in an action of debt, at the instance of the United States in this court, for a penalty under an act of Congress, the marshal has a right to require bail of the party."

As the indorsement does not specify under what particular act of Congress the penalty was recoverable, some doubt might have arisen in case there had been a distinction in any of the acts of Congress, the demand of bail being warranted upon actions for some kind of penalties, but not upon actions for others. But, as I believe there is no such distinction, nor any penalty of a nature similar to any of the exceptions in the State law, this circumstance may be laid out of the case.

If bail is requirable, it must be in virtue of some law of the United States; the whole of this subject, as is admitted, and is clear, depending, so far as the United States are concerned, on the authority of their own legislature.

The Congress have made some express provisions in regard to bail in criminal cases. They have made none that I can discover in civil cases.

It is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case, within the meaning of the provisions of Congress, but was, in truth, a civil suit; though for an act of disobedience for which a criminal prosecution might possibly have been commenced, if the act of Congress does not expressly, or impliedly, exclude it, a point not material to consider, because the civil suit has, in this instance, been in fact adopted. A criminal proceeding, unquestionably, can only be by indictment or information. The proceeding in question was neither.

There being, therefore, no express provision of any act of Con-

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gress on this subject, it is our duty to see if there be an implied one.

The provisions by Congress material to be considered for this purpose are the following :

In the act, entitled "An Act to establish the judicial courts of the United States" (passed the first session of the first Congress), there is a provision to this effect.

"SECTION 34. That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply."

The act of the first session of the second Congress, entitled "An Act for regulating processes in courts of the United States," etc., provides,

"SECTION 2. That the forms of writs, executions, and other process, except their style, and the form and mode of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act, entitled 'An Act to regulate processes in the courts of the United States,' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit court, or district court, concerning the same."

In the first act mentioned (section 17), there is a power given to all the courts of the United States, "to make and establish all necessary rules for the orderly conducting business in said courts, provided such rules are not repugnant to the laws of the United States."

In an act also of the second session of the second Congress (ch. 66), entitled "An Act in addition to the act entitled 'An Act to establish the judicial courts of the United States,'" there is the following provision :

"That it shall be lawful for the several courts, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations, and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the va-

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cation, and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."

Two different constructions have been contended for by counsel on both sides.

One that, in this case, the law of Virginia alone is to be the rule by which we are to decide whether bail was demandable or not.

The other, that some general law must be the rule, it not being supposable that in a case of this kind Congress meant to refer to any local laws of the particular States, which might be inapplicable in all their circumstances to the cases of the United States, which, it was contended, was the case expressly in this instance, the act containing exceptions in no wise applicable to the condition of the United States. It has, therefore, been insisted upon that in this instance we must be governed by the general laws of England, which were the original groundwork of our own, detached from the local laws of Virginia in particular.

Upon the suggestion of these two constructions, the following preliminary observations occur :

1. That in the formation of laws for a new government, so peculiarly circumstanced as that of the United States, wherein each State had a separate government of its own for internal purposes, with a system of laws originally in substance the same, but varying in a number of particulars, as the different habits and views of thinking of so many unconnected communities would naturally occasion, it would have been very unwise, if at all practicable, to have suddenly changed their methods of proceeding in all such cases upon which Congress had authority to legislate, in pursuit of a new, untried system of their own, the consequences and extent of which could not easily be foreseen.

2. That an attempt to establish such a system would, necessarily, have consumed more time than the exigency required ; and any regulation they could have adopted would, in all human probability, in the end, have been found extremely defective, from an impracticability which every professional man must be convinced would have existed in making special provisions of

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their own, adapted to every possible contingency within the sphere of their legislative power.

3. That under these circumstances, Congress, as a wise and discreet legislature, had no better resource than in respect to all cases requiring legislative provisions, where they could not devise a satisfactory special provision of their own, to refer generally to the laws of the different States, which before the institution of this government had possessed the whole legislative authority (with very few, if any, exceptions), as well in cases of general and local concern; and, therefore, might be presumed to have laws adapted to all the subjects recently appropriated to their own cognizance.

4. That in case of any such reference, we must consider of what nature the existing laws in each State were at the time of the reference, and whether they are applicable. In which case they must be considered in the same light as if the words of the act itself had been adopted and specially re-enacted by the legislative authority of the United States itself.

5. That this law must be completely applicable; because, if there be any part of the law qualifying and modifying the rest, of which a party cannot have the full benefit, this is not a case in which Congress have given any authority to adopt such part, since the whole law is not applicable, of which alone Congress speaks, and to which alone they can be supposed to refer; otherwise part of the law might be impracticable, which in itself would be oppressive; but, with the qualifications (inapplicable, and, therefore, rejected), might be wholesome and beneficial. It would, therefore, be altogether in the nature of a new law, and, of course, its adoption altogether unwarranted by any authority permitting only the application of an existing one.

6. That, as an exception from the general principle of a reference to the State laws in cases not specially provided for by their own, they have given a certain authority to their courts in regard to the form and method of proceeding, which authority, when exercised pursuant to the power given, is also equally binding, as if the regulation, accordingly made by the courts, had been a specific part of the court system established by the legislative authority itself.

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These general principles being premised, let us inquire,

1. Whether this be a case within the general reference of Congress to the laws of the States, or within the power given to the courts, or which is to be guided by some other law.

2. Whether, under the authority which is to guide us on the present occasion, bail was, or was not, demandable in the instance before us.

In considering the first point,

If the court possessed any authority, so far as that has been exercised, it is certainly in favor of a reference to the State law. But, as to this subject, I really think, with the counsel for the United States, that the admission or non-admission of bail is a subject of legislation so important, and in which the liberties of the citizens are so concerned, that a power merely of directing the practice of the courts cannot justly be extended to a case of this kind, but it must depend upon some precise law. The same distinction would serve in respect to the Process Act, if that applied, which I conceive it does not; because "suits at common law" certainly mean suits in a court of a common law jurisdiction, as contrasted with courts of an admiralty and maritime or equity jurisdiction, which every one knows are termed civil law courts, and proceed upon principles different from those which usually govern the courts of common law, though within their proper sphere recognized and protected by them. We are, therefore, to consider if this be a case which comes within the meaning of a reference to the State law, or is to be guided by some other law.

The words of the section comprehending a reference to the State law are as follows :

"That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in all trials at common law in the courts of the United States in cases where they apply."

First, it is proper to consider the import of these words, "in all trials at common law."

Is this a trial at common law?

A distinction is sometimes taken between a suit at common law and a suit upon a statute, where the latter is grounded upon

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different principles from the former, in which case perhaps it may properly be said that the one is a trial at common law, the other upon the statute.

But it is evident that that cannot be the meaning in the instance before us, because all "provisions under the Constitution, laws, and treaties of the United States are excepted." That plainly shows that, in the sense of the legislature, unless that exception had been made, cases arising upon the Constitution, laws, or treaties of the United States might have been decided, according to the laws of the States, within the general reference to those laws, "as rules of decision in trials at common law." It must, therefore, have some other meaning. What can that meaning be, "but trials in a court of common law jurisdiction, when exercising that authority," as contrasted with the courts of admiralty, and maritime, or equity jurisdiction, which are directed to proceed according to the principles, rules, and usages which peculiarly belong to them? This brings the expression exactly to the same sense as the words "common law" are used in the Process Act. Thus, in this case, though it be an action on the statute, it is an action of debt, which is a common law action, and will be tried in a common law manner, and no otherwise deviates from the common law than that "the ground of the debt is not immemorial," as the general principles of common law are.

Neither would a debt contracted by bond by an individual to-day. Yet nobody would hesitate to call an action of debt, grounded on that bond, a common law action.

Indeed, an action of debt, being an action on contract, could only be upon express or implied contract. Accordingly, Blackstone treats an action of debt of this description upon that very principle.

"From these express contracts the transition is easy to those that are only implied by law, which are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform, and, upon this presumption, makes him answerable to such persons as suffer by his non-performance.

"Of this nature, and first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party, and thus it is that every person is bound, and

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hath virtually agreed, to pay such sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that State which each individual is a member. Whatever, therefore, the laws order any one to pay, that instantly becomes a debt which he hath beforehand contracted to discharge.

"On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members) that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belongs to the body, or an amercement set in court leet, or court baron, upon any of the suitors of the court (for otherwise it will not be binding), immediately create a debt in the eye of the law, and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it, for which the remedy is by action of debt.

"The same reason may with equal justice be applied to all penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires." 3 Black. Com., 159, 160, 161.

The truth is, it is sometimes necessary to distinguish between actions of debt at common law and actions of debt upon a statute, for particular reasons not applicable to the mode of trial. For instance, it is necessary to show it to be "an action on the statute," because otherwise no cause of action will appear, a penalty in the case not existing at common law, and therefore creating no such contract. But when the cause of action is shown, the principles of common law pervade the whole of the trial. There may be other differences arising from particular provisions in a statute, but this is the leading one. But to open this exposition more fully, and lead directly to the considerations upon which the construction in question ought to be founded, I will consider the nature of the common and statute law of this commonwealth as they existed before the Revolution, and then inquire what alterations were made in either by the Revolution itself, the Articles of Confederation, or the present Constitution of the United States. The detail, if not immediately necessary, has a close affinity with the present subject, and will not be uninteresting, if the principles can be traced with any degree of certainty.

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It has constantly, I believe, been considered to be law in this State, as in others, that the common and statute law of England, as they existed in England at the time of the first settlement of the country, and so far as they were applicable to its situation, were in force, except in those cases where there was a special law of the Virginia legislature itself. I need not, at present, take any notice of any qualification to this principle, arising from any parliamentary right supposed to have existed before the Revolution, in any case where the then American provinces were specially named in any act of Parliament; no such exercise of power having been attempted, I conceive, upon a subject of this kind.

The laws of Virginia, therefore (so far as our present subject is concerned), consisted before the Revolution,

1. Of the common law.
2. Of the statute law.

The first comprehended all such parts of the common law as were such in England, unaltered by any statute law, at the time of the first settlement of this country, and applicable to its situation, and which had not been altered by any act of its own legislature afterwards.

The second comprehended two subjects:

1. The statute law of England as it existed at the time of the first settlement of this country, and so far as it was applicable.
2. The statute law of Virginia (as distinguished from the former), consisting of laws specially passed by the legislature of Virginia.

All this body of law was of equal authority, and to be viewed in the same light, as if the whole had originally existed in Virginia itself, and no part of it had been adopted from another country, the adoption of it making it completely its own.

Instead of names, therefore, which may serve to confound us, we may more properly distinguish this body of laws as the common and statute law of Virginia generally, than speak of any part of it (unless merely to show its origin) as the common and statute law of England; by which means we may view the latter as it really is, repealable in the very same manner as any special act of the Virginia Assembly, and by no means standing on any

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independent footing, which appears to have been the light in which it has been sometimes considered.

In the most arbitrary countries, even where the people have no share in the government, the sacred right of the people to choose their government is so far respected that the whole origin of power is alleged to be grounded, where they attempt to reason at all, only upon an implied consent of the people at large.

Consequently, every government, whatever be its form, exercises its trusts for the benefit of the people; and it is to be considered as having their authority for every act it performs in pursuance of its constitutional power.

In this sense every legitimate act of government is in effect an act of the people themselves; it emanating from their authority either expressly or impliedly given. If the people could act in person, no one can doubt that whatever they once enacted as a rule, either of government or law, must remain such until altered by themselves.

Their inability to act personally necessarily occasions a delegation of their power to others, but when delegated it is of the very same nature as if exercised by themselves in person.

Therefore, every act of authority by their representatives must remain in being until altered by themselves, or by some future act exercised by persons possessing an equal share of power.

Whence it follows that when the people of this State, by their representatives, declared their former government dissolved, and established a new constitution; so far as what they in this respect did was inconsistent with what had been done by their authority before; a new law was introduced and the old one changed; but every other part of it remained entire.

By the word "*law*" in this sense I do not mean "*law*" as distinguished from the constitution, under which a particular law has been enacted or adopted, and which is its most usual meaning, but I mean "the whole law of the State," including the constitution and all laws enacted, or being, under it; the only difference being that a constitution, while in existence, is the fundamental law of the State, not alterable by its ordinary legislature; but all other species of laws are.

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I know that some are of opinion that a resolution *ex vi termini* abolishes all laws, and throws the people into a state of nature, but this I can never conceive to be the case (if it be in any country) in one where all the laws of every kind are derived mediately or immediately from the authority of the people themselves, who never have admitted, and I trust never will admit, that they hold any rights as mere appendages of particular persons in power, which can alone, as I conceive, afford any foundation for the opinion I am considering. If government be a mere trust for their benefit; if all its officers are their officers, and their authority of consequence but as originally sanctioned by them; and if they think proper to choose a new mode, in which new laws are to be made and all laws properly enforced, what reason can there be for saying that merely doing this (which is simply the case of voluntary revolution) without doing or saying anything more, is in fact doing *more than this*? that is to say, not merely providing a new government for themselves, but actually abolishing all laws of every kind whatsoever which subsisted under the old one.

A constitution is one thing, particular and repealable laws subsisting under the constitution are another. Consequently, the former may be changed, and not the latter; and, as the authority of the people is absolutely necessary to change the one, so it is also (in some mode, whatever they may be) to change the other.

The result of my observation (if I am not mistaken in my principles) is, that the Revolution of 1776 did not totally abrogate all laws subsisting before, but only such as became inconsistent with the new form of government assumed and the new constitution established.

The common and statute laws of Virginia, then, stood as follows:

1. Such parts of the common law as were unaltered by any English statute at the first settlement of the country, applicable to the situation of the people, and not altered by any subsequent act of the legislature of Virginia afterwards, and were not inconsistent with the new constitution adopted.

2. Such parts of the statute law of England, as were in force

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at the first settlement of the country, applicable to the situation of the people, and not unaltered by any subsequent act of the Virginia legislature, together with the addition of all other acts, then in force, which were originally passed by the Virginia legislature itself; so far as the whole was applicable to the new situation of the people, under the change of the government and the adoption of the Constitution.

If these principles are right, it equally, or more strongly, follows that under the two great subsequent changes, arising from the Articles of Confederation, and the present Constitution of the United States, no subsisting law was altered, but where it was plainly inconsistent with the powers, in the particular cases, transferred to the government of the United States.

In order to illustrate this point, let us consider, in particular, the nature of the change operated by the present Constitution of the United States.

By that Constitution, all legislative subjects were divided into two branches; one surrendered to the government of the United States, one retained to the States.

In some instances the authority of both was a concurrent power (as in the instance of taxation, with a few exceptions); in other instances the power of the General government I consider as exclusive, as in the authority given "to establish uniform laws on the subject of bankruptcies, throughout the United States."

The laws of the States, in regard to that share of legislative power retained to themselves, after the adoption of the Constitution, remained unaltered, and were only alterable by the legislatures of the States themselves. Of this kind, for instance, is the law of Virginia relative to a descent of lands. The legislature of the United States have no power to alter the rules of descent of lands, nor can they be affected in any manner by the government of the United States, unless by treaty, in some singular instances where it may be fairly presumed certain regulations concerning them come within the legitimate objects of a treaty. Abstracted from this exception, if any person, having a right to sue for the recovery of lands in court, bring such a suit, he can only entitle

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himself to recover under the laws of Virginia as they existed at the time when the suit was brought.

In regard to the share of legislative power exclusively surrendered to the United States (which is the only part of it which concerns our present subject), the effect of this I take to have been (unless there was a manifest inconsistency in their continuing in being) that the subsisting laws as to such subjects did not *ipso facto* cease; but that they would remain as they then stood, until Congress exercised its legislative authority.

Of this kind, perhaps, is the power as to bankrupt laws, which I before noticed. The moment that power is exercised all State bankrupt laws cease; but until it is exercised it is at least questionable whether they do not remain in being; though I presume no separate legislature of the United States had a right to pass a new law upon the subject.

The law concerning bail is perhaps of this nature. It is in no manner inconsistent, that I can perceive, with the change of government; and therefore I should have been strongly inclined to think that Congress made no express reference to the laws of the different States as rules of decision, that until they made a law concerning such subject the State law in relation to it would have been in force.

But I have no doubt that under the express reference, by the act of Congress, to the laws of the several States, as rules for our decision, fortified by the considerations I have stated, the law of Virginia, whatever it may be, concerning the requisition of bail in actions of debt by the public upon penal statutes, is that by which we are bound to decide on the present occasion.

The question then is, what is the law of Virginia upon that subject?

The act of Assembly produced, being the latest law on the subject of bail by which we can be governed, must be the guide in this instance, if this particular case is comprehended within its provisions.

If it be not, then we must consider what is the law of Virginia regulating cases of this description; whether it be a part of the common law, unaltered by any statutes, or a statute law relative to this subject, originally passed in England, but by adop-

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tion forming a part of the statute law of the commonwealth, or some particular act on the subject, passed in Virginia itself, if any.

The first inquiry is, whether a case like the present is within the act of Assembly contended for at the bar, as the only rule of decision.

Two objections are to be considered :

One insisted upon by counsel for the United States, that the Virginia act containing exceptions not applicable to the situation of the United States, the whole law is not applicable ; and, therefore, is not within the meaning of the act of Congress.

The other is an objection suggested by the court, whether this act extends to suits by the commonwealth, or only to suits at the instance of private persons.

As to the first, I do not think it a sufficient objection, because it in no respect changes the principle of the application. If there be no case existing, or which can exist, under the government of the United States of the nature of those constituting exceptions as to the law in question, the exceptions stand, as to them, as if no such exceptions existed. If there be a possibility of any case, under the government of the United States, of the nature of the excepted cases, the law as to the exceptions will then prevail as to such cases under the government of the United States as it does in the general, in cases not within the exception ; and, therefore, in every instance, either the general law as to bail, or the special law as to the exceptions, will have the effect intended by either.

As to the objection taken by the court, and which came from myself, I am convinced on reflection it is of no weight.

It is a general rule in England, from whence our principles of law are generally derived, that the king, who is the sole representative of the public there in all suits at law, is not bound by any act of Parliament, immediately affecting his rights, unless particularly named. This, in some instances, may be grounded on mere prerogative, without any good reason, so far as it respects the public. But in many instances that privilege exists for the benefit of the public, and to prevent their sustaining an injury.

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This may be exemplified as to the old doctrine "*Nullam tempus occurrit regi.*" So that a general statute of limitations affecting lands was held not to extend to the king; because the law presumed, from the variety of his public functions, that he could not have such opportunities of knowing of encroachments upon his landed property, formerly of great extent, as an individual could of encroachments upon his; and, of course, could not naturally be expected to be as vigilant in bringing suits to redress himself.

This was a case wherein the public evidently had an interest as well as the king personally. A few years afterwards a limitation was put upon this prerogative, which had been abused.

To a certain degree I presume that this privilege belongs to this commonwealth, as the public officers, in the immense territory comprised within this commonwealth, cannot be expected to have early or exact information of encroachments upon public rights.

Other instances might be shown, in which the possession of such a privilege by the public may be deemed proper.

But, upon examining authorities, I find that though the rule I stated as in England be a general one, it admits of many exceptions; and, indeed, the privilege seems to be confined to cases where the king might otherwise be deprived of some personal or legal right, and not to provisions of general law arising from principles of policy alone.

Upon the present occasion Congress, by creating the penalty and not superadding any new provision, by leaving it to be recovered at the option of the officer (which it expressly does by general words having that operation in another place) by action of debt, leaves it to the usual fate of actions of debt for penalties whatever may be the consequences that attend them. The words of the law being general, and there being no reason for excepting the case of the public on account of any peculiar privilege to which this subject has no relation, I conceive the act of Assembly in question is that by which, under the general reference by Congress, we are to be governed on the present occasion.

This opinion is further strengthened by what was mentioned at the bar, that in common actions of debt by the commonwealth

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this act has been uniformly considered as the guide in the State courts. If the commonwealth is bound by the general words of the act in that case, no reason can be given, that I can suggest, why the commonwealth is not equally bound by the provisions of the act in every other case coming within its provision. Even under the English law as now in practice (however introduced), though special bail is required in actions of debt for money upon a common contract, yet in actions of debt upon penal statutes it is not; and the reason assigned shows that whatever construction is given in favor of a defendant in the former case applies *a fortiori* to the latter.

In 1 Bac. Abr., 210, it is said: "On a penal statute the defendant is not held to bail, because the penalty on a statute is in the nature of a fine or amercement, set on the party for an offence committed; and, therefore, no person ought to suffer any inconvenience by reason of such law till he is convicted of the offence." For which he cites Yelv., 53, Brownl., 293.

The act of Assembly being thus established to be a rule of decision in the present case, for the reasons I have given,

The next inquiry is, What is its operation? Upon this there can be no doubt. A *capias* is to be taken out, served on the party, and returned executed, but no bail to be required.

I admit that if this act was only directory to the court, or to the clerk, but not to the sheriff, he would be bound to obey the writ he received, accompanied with the directions given, if any, and could not be said to act illegally in requiring bail, when under no injunction to the contrary.

But the indorsement required by the act is an indorsement of the true species of action, in order that the sheriff may himself see whether bail was or was not requirable by the act.

An indorsement as to the requisition of bail or not, even by the court itself, unless in cases where they may have a discretion, would not justify him in requiring bail where the act did not authorize it, because it would be altogether extrajudicial.

The indorsement in this instance, therefore (as was properly observed at the bar), is only an indorsement of a highly respectable official character, whose opinions justly deserve very great deference, but are not conclusive.

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The greatest lawyers, even the greatest judges, are liable sometimes to mistakes in opinion. Lord Mansfield has, at least on twenty occasions, changed an opinion positively given. Lord Hardwicke has in some instances. So have many other illustrious characters. The greatest abilities are indeed generally accompanied with the greatest candor, and a desire, uninfluenced by any former conviction or prepossession, to do right under any circumstances whatever.

The present instance was a case attended with many novel and difficult circumstances. They have served to embarrass the consideration of the court itself, anxious in a new case to proceed upon principles well examined and reflected upon.

The consequences of our decision cannot altogether be overlooked, because the nature of these subjects, upon which penalties may be enacted by the legislature of the United States, may reasonably require a different law from what prevails in cases under the law itself.

The latter may indeed operate upon foreigners, but in most cases it will operate on citizens and residents of the country, and whose escape from prosecution may, therefore, be less apprehended.

The penalties of the United States must from their nature as frequently, if not more so, operate upon foreigners as well as citizens, upon men who having no residence in the country, and having committed an offence, may avoid the penalty annexed to it by speedily quitting the country.

These are consequences which may probably make a new law necessary. They are such as might well make the attorney for the United States cautious how he advised against requiring bail, unless he had the sanction of the court for such immunity. But they are consequences which cannot alter the construction of the law, where the law is clear, as I think it is upon all the considerations I have stated, though not perhaps obvious, upon a slight reflection. It may be lamented, in this case, that a man guilty of a most daring violation of the peace of the country, and an inhuman assault upon an innocent and meritorious officer, should escape punishment proportioned to his offence. But no passion must mingle in the administration of justice. The law

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alone ought ever to be, and I trust ever will be, the guide of our decision. Upon the present occasion, we cannot give judgment against the defendant without saying that the marshal had a right to require special bail from him upon both of the precepts which were issued. But we are of opinion, for the reasons I have given, that he had no right to require special bail upon one of them.

The consequence of which is, that there must be judgment for the defendant.

United States Circuit Court, at Columbia, November Term, 1871.

UNITED STATES v. ROBERT HAYES MITCHELL *et als.**

Upon an indictment of conspiracy, if the jury find that a conspiracy existed, and that the accused was a party to it, it is sufficient to warrant a conviction that the object of the conspiracy was to effect one of the purposes alleged in the indictment.

Each member of an unlawful conspiracy is a conspirator and is responsible, personally, for every act of the conspiracy, and for the acts of each member thereof, done by common consent in furtherance of its illegal purposes, and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration; whether the party charged was actually present or not when such act was done.

It makes no difference in guilt, if the motive of a party joining a conspiracy was not illegal when he did join it, if he was afterwards aware of its illegality and still remained a member.

THIS was an indictment of conspiracy in violation of section 6 of the act of Congress, approved May 31st, 1870, entitled "An Act to enforce the right of citizens to vote," etc.

The indictment contained two counts, one for conspiracy to

* A full report of the proceedings in this and similar cases of conspiracy tried at the same term, may be found in the "Ku Klux Conspiracy" (being the report, with accompanying testimony, made by the joint special committee of Congress, to inquire into the condition of affairs in the late insurrectionary States, printed in 1872), vol. 5, pages 1615 to 1990.

The present report is furnished for this volume by William Stone, Esq., late the United States Attorney for South Carolina.

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violate section first of the said act, and the other with intent to oppress, threaten, and intimidate one James Williams, a male citizen of the United States, of African descent, because he had exercised the right of voting on the third Wednesday in October, 1870.

Robert Hayes Mitchell was first called up and his case was tried separately.

In the trial of this case it was given in evidence by the prosecution that there existed in several of the northwestern counties of South Carolina, a powerful, secret, oath-bound organization, known as the Ku Klux Klan, whose object was the defeat of the Republican party; and that the means used to accomplish this result were the killing of white Republicans and the whipping and intimidation of negroes, to keep them from voting.

The "Obligation," "Constitution," and "By-Laws" of the organization were proved by members of the Klan, and were as follows:

OBLIGATION.

I (name) before the immaculate Judge of heaven and earth, and upon the Holy Evangelists of Almighty God, do, of my own free will and accord, subscribe to the following sacredly binding obligation:

1. We are on the side of justice, humanity, and constitutional liberty, as bequeathed to us in its purity by our forefathers.
2. We oppose and reject the principles of the radical party.
3. We pledge mutual aid to each other in sickness, distress, and pecuniary embarrassment.
4. Female friends, widows, and their households shall ever be special objects of our regard and protection.

Any member divulging, or causing to be divulged, any of the foregoing obligation, shall meet the fearful penalty and traitor's doom, which is Death! Death! Death!

CONSTITUTION.

ARTICLE 1. This organization shall be known as the — Order, No. — of the Ku Klux Klan, of the State of South Carolina.

ARTICLE 2. The officers shall consist of a Cyclops and Scribe, both of whom shall be elected by a majority vote of the order, and to hold their office during good behavior.

ARTICLE 3. It shall be the duty of the Cyclops to preside in the order, enforce a due observance of the constitution and by-laws, and an exact compliance to the rules and usages of the order; to see

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that all members perform their respective duties; appoint all committees before the order; inspect the arms and dress of each member on special occasions; to call meetings when necessary; draw upon members for all sums needed to carry on the order.

SEC. 2. The Scribe shall keep a record of the proceedings of the order, write communications, notify other Klans when their assistance is needed, give notice when any member has to suffer the penalty for violating his oath, see that all books, papers, or other property belonging to his office, are placed beyond the reach of any but members of the order. He shall perform such other duties as may be required of him by the Cyclops.

ARTICLE 4. SECTION 1. No person shall be initiated into this order under eighteen years of age.

SEC. 2. No person of color shall be admitted into this order.

SEC. 3. No person shall be admitted into this order who does not sustain a good moral character, or who is in any way incapacitated to discharge the duties of a Ku Klux.

SEC. 4. The name of a person offered for membership must be proposed by the committee appointed by the Chief, verbally stating age, residence, and occupation; state if he was a soldier in the late war; his rank; whether he was in the Federal or confederate service, and his command.

ARTICLE 5. SECTION 1. Any member who shall offend against these articles, or the by-laws, shall be subject to be fined and reprimanded by the Cyclops, as two-thirds of the members present at any regular meeting may determine.

SEC. 2. Every member shall be entitled to a fair trial for any offence involving reprimand or criminal punishment.

ARTICLE 6. SECTION 1. Any member who shall divulge any of the matters of the order shall suffer death.

ARTICLE 7. SECTION 1. The following shall be the rules of order. Any matter herein not provided for shall be managed in strict accordance with the Ku Klux rules.

SEC. 2. When the Chief takes his position on the right, the Scribe with the members forming a half-circle around them, and, at the sound of the signal instrument there shall be profound silence.

SEC. 3. Before proceeding to business, the Scribe shall call the roll and note the absentees.

SEC. 4. Business shall be taken up in the following order:

1. Reading the minutes.
2. Excuse of members at preceding meeting.
3. Report of committee of candidates for membership.
4. Collection of dues.
5. Are any of the order sick or suffering?
6. Report of committees.
7. New business.

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BY-LAWS.

ARTICLE 1. SECTION 1. This order shall meet at —.

SEC. 2. Five (5) members shall constitute a quorum, provided the Cyclops or Scribe be present.

SEC. 3. The Cyclops shall have power to appoint such members of the order to attend to the sick, the needy, and those distressed, and those suffering from radical misrule, as the case may require.

SEC. 4. No person shall be appointed on a committee unless the person is present at the time of appointment. Members of committees neglecting to report shall be fined thirty cents.

ARTICLE 2. SECTION 1. Every member on being admitted shall sign the constitution and by-laws, and pay the initiation fee.

SEC. 2. A brother of the Klan, wishing to become a member of this order, shall present his application, with the proper papers of transfer from the order of which he was a member formerly, shall be admitted to the order only by a unanimous vote of the members present.

ARTICLE 3. SECTION 1. The initiation fee shall be —.

ARTICLE 4. SECTION 1. Every member who shall refuse or neglect to pay his fines or dues shall be dealt with as the Chief thinks proper.

SEC. 3. Sickness, or absence from the country, or being engaged in any important business, shall be valid excuses for any neglect of duty.

ARTICLE 5. SECTION 1. Each member shall provide himself with a pistol, Ku Klux gown, and signal instrument.

SEC. 2. When charges have been preferred against a member in a proper manner, or any matters of grievance between brother Klux are brought before the order, they shall be referred to a special committee of three or more members, who shall examine the parties, and determine the matters in question, reporting their decision to the order. If the parties interested desire, two-thirds of the members present voting in favor of the report, it shall be carried.

ARTICLE 6. SECTION 1. It is the duty of every member who has evidence that another has violated Article 2 to prefer the charge and specify the offence to the order.

SEC. 2. The charge for violating Article 2 shall be referred to a committee of five or more members, who shall, as soon as practicable, summon the parties and investigate the matter.

SEC. 3. If the committee agree that the charges are sustained, that the member on trial has intentionally violated his oath or Article 2, they shall report the fact to the order.

SEC. 4. If the committee agree that the charges are not sustained, that the member is not guilty of violating his oath or Article 2, they shall report to that effect to the order, and the charges shall be dismissed.

SEC. 5. When the committee report that the charges are sustained,

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and the unanimous vote of the members is given in favor thereof, the offending person shall be sentenced to death by the Chief.

SEC. 6. The prisoner, through the Cyclops of the order of which he is a member, can make application for pardon to the Great Grand Cyclops of Nashville, Tennessee, in which case execution of the sentence can be stayed until pardoning power is heard from.

During the progress of the trial it was given in evidence that this organization deliberately planned the murder of one James Williams, a colored Republican, who had been a captain in a militia company in York County; that pursuant to the orders of one J. W. Avery, the Chief of the order in York County, between forty and sixty members of the Klan met at night in an old muster-field, mounted, armed, and disguised, and proceeded to the house of said Williams, broke into it, took him to the woods near by, and there hung him until he was dead; a card being left upon him, which was found the following morning, bearing the words, "Jim Williams on his big muster."

On the same night the same party visited divers other houses of colored people, took them out, threatened them, robbed them of their arms, and informed them that if they voted again they should be killed. The defendant was among those who participated in this "raid."

Amzi Rainey, colored, testified that the Ku Klux came to his house one Saturday night about ten o'clock, broke it open by force, and beat his wife.

Rainey had gone into the loft of his house when he found the Ku Klux were there, but search was made for him, and he was found and brought down.

After a series of cruelties, Rainey was forced to swear that he would never vote another radical ticket.

Dick Wilson, colored, in the course of his examination said that the Ku Klux visited his house on the 11th of April, about two or three o'clock in the morning. The door was forced open, and the men outside began firing into the house.

Afterwards witness was compelled to go with them to the house of his son, who lived near him, where an unsuccessful search was made for him. When they could not find his son,

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they came out of the house, and asked witness where he was. He said, "Gentleman, I don't know." The reply was, "Don't you call me any gentleman; we are just from hell-fire; we haven't been in this country since Manassas," etc.

After more talk, some one said to him, "We'll make a Democrat of you to-night."

They made this man lie down, and whipped him with ram-rods until he promised to publish a card stating that he was done with the Republican party, and with Scott and his ring.

During his argument before the jury, Mr. Johnson, one of the counsel for the defendant, made use of the following language, with reference to the facts proved at the trial: "But Mr. Attorney-General (Mr. Chamberlain) has remarked, and would have you suppose, that my friend and myself are here to defend, justify, or palliate the outrages that may have been perpetrated in your State by this association of Ku Klux. He makes a great mistake as to both of us. I have listened with unmixed horror to some of the testimony which has been brought before you. The outrages proved are shocking to humanity. They admit of neither excuse nor justification. They violate every obligation which law and nature imposes upon men. They show that the parties engaged were brutes, insensible to the obligations of humanity and religion.

"The day will come, however, if it has not already arrived, when they will deeply lament it. Even if justice shall not overtake them, there is one tribunal from which there is no escape. It is their own judgment, that tribunal which sets in the breast of every living man—that still small voice that thrills through the heart, the soul of the mind, and as it speaks, gives happiness or torture—the voice of conscience, the voice of God. If it has not already spoken to them, in tones which have startled them to the enormity of their conduct, I trust, in the mercy of heaven, that that voice will speak before they shall be called above to account for the transactions of this world; that it will so speak as to make them penitent, and that trusting in the dispensations of heaven, whose justice is dispensed with mercy, when they shall be brought before the bar of their great tribunal, so to

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speak, that incomprehensible tribunal, there will be found, in the fact of their penitence or in their previous lives, some grounds upon which God may say *Pardon!*”

At the conclusion of the arguments the court charged the jury as follows :

BOND, J.—You have listened with patience to the recital of the evidence in this cause, and without commenting upon *that*, the court proposes to state to you the law applicable to the evidence, which must guide you in making up your verdict. The indictment, gentlemen, is for a conspiracy, which is an agreement by two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. The thing to be punished is the unlawful conspiracy, and not the particular acts done in pursuance of it. The conspiracy is a crime, if nothing be done in pursuance of it.

The indictment, gentlemen, contains two counts. The first charges the defendant and others, jointly indicted with him, with having conspired to violate the first section of the act of May 31st, 1870, by unlawfully hindering, preventing, and restraining a certain class of persons therein named from the future exercise of the right to vote at an election to take place in October, 1872, on account of their race, color, or previous condition of servitude.

And the second count charges that he, with others, did conspire to injure, because of his color, James Williams, because he had exercised the right to vote previously. It is to these counts that you are to refer the evidence, and to apply the law which the court gives you.

If you find, from the evidence, that there was no such conspiracy as that described in the first count, or if there was a conspiracy, the object of which and its purpose were different from that set forth in the count, and that the object and purpose set forth in the count was not one of its purposes and objects, then the party charged is not guilty under the first count, though he may have been engaged in the conspiracy. But it is not necessary, if the jury find there was a conspiracy, and that the party was engaged in it, that they should find its purpose to have been

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single. If they find that one of its purposes was that set forth in the first count, to prevent citizens from the exercise of the right to vote because of their color, it is sufficient. An association having such a purpose is an unlawful conspiracy, and a party engaged in it may be punished under the first count.

Each member of such an association is a conspirator, and is responsible, personally, for every act of the conspiracy, and for the acts of each member thereof, done by common consent, in furtherance of its illegal purposes, and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration, and that whether the party charged was himself actually present or not when such act was done. And if the jury believe, from the evidence, that the various Klans spoken of by the witnesses, were but parts of one general conspiracy, this rule applies not only to the members of the same Klan, but to the acts and conduct of the members of the different Klans done in furtherance of the conspiracy. And it makes no difference in guilt if you find from the evidence that the motive of a party who joined the conspiracy was not illegal when he did join it, if you also find, that after he became a member, he was aware of the fact, or had reason to know, that the true object of the conspiracy was to prevent or hinder the free exercise of the elective franchise by intimidation or violence, as aforesaid, on account of color, and that he still remained a member and participated in its meetings, and that, though you may also find he never himself actually used the force, intimidation, or violence, and was not present when it was used.

And now, if the jury find, from the evidence, that the party charged did so conspire to prevent the citizens described from exercising their right to vote on account of their color, at a future election, specified to be the election to take place on the third Wednesday of October, 1872, then the party charged is guilty under the first count of the indictment. And if the jury find, from the evidence, that they did so conspire, and for the same reason, to injure and oppress, on account of his color, one Jim Rainey, alias Jim Williams, because he had antecedently, on the third Wednesday of October, 1870, exercised his right to vote, then he is guilty on the second count.

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But if the jury find, from the evidence, that no such conspiracy existed, or that if it existed, the intimidation or injury of voters, because of their exercise of the suffrage, or to prevent its exercise, formed no part of its purpose, or that, if that were its purpose, the defendant was not engaged in it, then the defendant is not guilty.

But the jury is not bound to believe the sole purpose of the conspiracy to be that set out in the first count; if they find it to be one of the purposes, it is sufficient. Nor if they find that the beatings and intimidation spoken of by the witnesses took place or existed, are the jury bound to believe that the reasons given at the time by the conspirators, if they find reasons were given, were the true reasons for such conduct, but the jury may determine, from all the evidence in the cause, what the true reasons were for such violence.

If the jury find, from the evidence, as we said before, that the conspiracy set forth in the first and second counts in the indictment existed, and the defendant engaged in it there, he is guilty on both counts.' If there existed no such conspiracy at the time set out in the indictment, or if existing, it had another object which did not include that set out in the indictment, or if existing, and having the illegal purpose, the defendant took no part in it, then he is not guilty. The jury are at liberty to find one of three verdicts. They may find the party guilty generally, or not guilty generally, or they may find him guilty on one count, and not guilty on the other.

The jury found a verdict of guilty on the second count. A motion was made for a new trial, but it was overruled, and the prisoner was subsequently sentenced to eighteen months' imprisonment and a fine of one hundred dollars.

Reverdy Johnson and Henry Stanberry, for defence.

D. T. Corbin, United States Attorney, and D. H. Chamberlain, for United States.

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*United States Circuit Court, at Columbia, S. C., November Term, 1871.**

THE UNITED STATES *v.* ALLEN CROSBY, SHEROD
CHILDERS *et al.*

The first section of the act of May 31st, 1870 (U. S. Stat., vol. 16, p. 140), declared a right, and section 7 of the same act defines the punishment for its violation.

It is not necessary that each section of the act should contain or disclose the penalty for its infraction. That is often, as in this statute, referred to a later and generally to the closing section of the act defining the crime or offence, and is made applicable to all the antecedent sections.

In charging a statutory offence it is generally sufficient to set it out in the words of the statute. If the statute uses a common law name for a crime which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offence at common law.

Congress has never assumed the power to prescribe the qualifications of voters in the several States. To do so is left entirely to the States themselves. The right of a citizen to vote depends upon the laws of the State in which he resides, and is not granted to him by the Constitution of the United States; nor is such right guaranteed to him by that instrument. All that is guaranteed is that he shall not be deprived of suffrage by reason of his race, color, or previous condition of servitude.

The right to be secure in one's house is not a right derived from the Constitution. It existed long before the adoption of the Constitution at common law, and cannot be said to come within the meaning of the words of the act, "right, privilege, or immunity granted or secured by the Constitution of the United States."

Congress has power to interfere for the protection of voters at Federal elections, and that power existed before the adoption of the fourteenth or fifteenth amendments to the Constitution.

THIS was an indictment for conspiracy contrary to the provisions of sections 5, 6, and 7 of the act of Congress of May 31st, 1870, to enforce the rights of citizens to vote, etc., and section 2 of the act of April 20th, 1871, to enforce the provisions of the fourteenth amendment.

* The report of this case was prepared for this volume by William Stone, Esq., late United States Attorney for South Carolina.

Statement of the case.

The indictment contained eleven counts, which charged as follows:

FIRST COUNT. That Allen Crosby, etc., on the first day of February, 1871, unlawfully did conspire together with intent to violate the first section of the act entitled "An Act to enforce the rights of the citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31st, 1870, to wit: "That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding," contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT. That on the same day, the defendants "unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the Constitution and laws of the United States, to wit, the right of suffrage contrary," etc.

THIRD COUNT. Same as the second, with the addition of a charge of burglary, in the following words:

That said Allen Crosby . . . about the hour of eleven of the clock in the night, on the day and year aforesaid, at the county, etc., in the act of committing the offence aforesaid as aforesaid set forth and alleged, with force and arms the dwelling-house of the said Amzi Rainey, there situate, feloniously and burglariously did break and enter with intent to commit a felony; and that the defendants in the said dwelling-house there being, in and upon the said Amzi Rainey, in the said dwelling-house then being, then and there, unlawfully, maliciously, and feloniously did make an assault; and the said defendants, the said Amzi Rainey, in and upon the head, shoulders, and back of the

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said Amzi Rainey, then and there unlawfully, maliciously, and feloniously did strike, cut, and wound, with intent to do unto said Amzi Rainey some grievous bodily harm, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina.

FOURTH COUNT. That the same day the defendants unlawfully did attempt to control Amzi Rainey in exercising the right of suffrage, to whom the right of suffrage is secured and guaranteed by the fifteenth amendment to the Constitution of the United States, by threats of violence to himself, contrary, etc.

FIFTH COUNT. Same as the fourth count, with the addition of a charge of burglary, as set out in the third count.

SIXTH COUNT. That on the same day, defendants unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, because of his free exercise of a right and privilege granted and secured to him by the Constitution and laws of the United States, to wit, the right of suffrage, contrary, etc.

SEVENTH COUNT. Same as the sixth count, with the addition of a charge of burglary, as set out in the third count.

EIGHTH COUNT. That on the same day, defendants unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the Constitution of the United States, to wit, the right to be secure in his person, houses, papers, and effects against unreasonable search and seizure, contrary, etc.

NINTH COUNT. That on the 21st day of April, 1871, the defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of the equal protection of the laws, contrary, etc.

TENTH COUNT. That on the 21st day of April, 1871, defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of equal privileges and immunities under the laws, contrary, etc.

ELEVENTH COUNT. That on the 21st day of April, 1871, defendants unlawfully did conspire together to injure Amzi Rainey,

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a citizen of the United States, lawfully entitled to vote, in his person, on account of giving his support, in a lawful manner, in favor of the election of A. S. Wallace, a lawfully qualified person, as a member of the Congress of the United States, contrary, etc.

On December 4th, 1871, it was moved in behalf of the defendants, to quash the indictment on the following grounds :

As to the first count :

1. The conspiracy charged is, to violate the first section of the act of May 31st, 1870, which section defines no crime or offence, and forbids nothing.

2. The names of the persons hindered or prevented, or not allowed to vote, are not set forth, nor is it alleged that their names were unknown to the grand jury.

3. The means by which the unlawful prevention was effected are not set forth.

4. The specific election at which they were not allowed to vote, whether for State, county, municipal, United States officers or representatives in Congress, is not set forth.

5. Nor the date of the election, as stated, third Wednesday of October, 1872.

6. The qualifications of said male citizens to vote are not set forth.

As to the second count :

1. It is not alleged that said Rainey was qualified to vote.

2. Nor that there was any election.

3. The unlawful means are not set forth.

As to the third count :

The defendants rely here upon this further objection, to wit :

The burglary and battery charged in this count is not alleged as an overt act of the conspiracy, but as a distinct offence against the State of South Carolina, as is cognizable by, or within, the jurisdiction of this court, but is exclusively cognizable by the State court, having jurisdiction of such offences in the said county of York.

As to the fourth count :

1. It does not allege that said Rainey was, at the time when, etc., a citizen of the United States ; or, that the right of suffrage was then secured to him by the said fifteenth amendment.

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2. It is not alleged that he was otherwise qualified to vote than by force of the said amendment.

3. No election is set forth.

As to the fifth count :

The defendants rely upon the same objections to this count as set forth to the said second and third counts.

As to the sixth count :

The defendants rely upon the same objections to this count as are set forth to the said second count; and in addition, that it is not alleged that he had exercised the privilege therein mentioned.

As to the seventh count :

The defendants rely upon the same objections to this count as are set forth to the second, third, and fourth counts.

As to the eighth count :

1. The means by which he was to be hindered are not set forth.

2. It is not alleged which of the rights—those of person or property—were intended to be invaded, searched, or seized.

3. It is not alleged that he was a householder.

As to the ninth count :

1. It is not averred in what way, or by what means, the said Rainey was so deprived of the equal protection of the laws.

2. It is not averred what were the laws, Federal or State, of the protection of which he was so deprived.

3. It is not alleged that he was a citizen of the United States, or of any State, or any Territory of the United States.

As to the tenth count :

The defendants rely upon the same objections as set forth to the ninth count; and, further, that it is not set forth what privileges or immunities he was so deprived of.

As to the eleventh count :

1. It is uncertain, because it does not appear that the conspiracy and injury were before or after the election.

2. The particular election, or when, or where, it occurred, is not set forth, and no day is given, except the date of the conspiracy; that is to say, the 21st of April, 1871, the next day after the act was passed.

3. It is not alleged that said Rainey was qualified to vote

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at *that* election, or that he was a citizen of the State or resident of the Congressional district where the election was held.

4. It was not alleged that said Wallace was a citizen of the United States, or a citizen of the State or district in which said election was held, nor that he was a candidate for election, or that said Rainey voted or intended to vote for him.

Clawson, Thompson and Clawson, and Hon. Reverdy Johnson and Hon. Henry Stanberry, for defendants.

D. T. Corbin, United States Attorney, and Hon. D. H. Chamberlain, for the United States.

BOND, C. J.—After the prolonged and very able argument of counsel upon this motion to quash, we feel embarrassed, gentlemen, that, upon so little deliberation, we are to pass judgment upon the grave questions raised here.

But the fact that so many persons are now in confinement upon these charges and that so many witnesses are in attendance upon the court, at great personal expense, makes it necessary that we should not delay longer. And the first objection to the first count in the indictment is, that the section of the act of May 31st, 1870, which this count charges the parties with conspiring to violate, declares no penalty for the offence.

The first section of the act declares a right. It is referred to in this count by its number, and with sufficient certainty it seems to us to enable the parties charged, after trial, to plead the verdict rendered in this case in bar to another indictment. After declaring the right, the statute proceeds, in section 7, to define the punishment for its violation.

It is not necessary, it seems to us, that each section of the act should contain or disclose the penalty for its infraction.

That is often, as in this statute, referred to a later and generally to the closing section of the act defining the crime or offence, and is made applicable to all the antecedent sections.

It is objected, moreover, that this count does not contain the names of the parties who, being entitled to vote, were to be hindered and prevented from the exercise of the elective franchise

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by the traversers. It must be remembered that this is not an indictment to punish a wrong done to individuals, against the peace and dignity of the United States, but for a conspiracy to do that wrong. The offence is completed the moment the compact is formed, whether any person, within the contemplation of the first section, has actually been hindered or not. If the traversers never committed any overt act, but separated and went home after the completion of the conspiracy, they have incurred the penalty which the seventh section prescribes.

So it makes no difference what particular person the conspiracy when put in motion first reached. The act complained of is the conspiracy; and if it be true that any person was hindered or prevented from the exercise of the right granted by the first section, such hindrance and prevention is only proof of the conspiracy, and does not in anywise tend to make the crime more complete.

It is generally sufficient, in charging a statutory offence, to set it out in the words of the statute. If the statute uses a common law name for a crime which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offence at common law.

But when the statute itself creates the offence and defines it, it is sufficient if the indictment uses the words of the statute, unless the words be indefinite and vague, ambiguous or general, in which case the indictment must so particularize the act complained of that the party charged shall be in no doubt of the offence alleged against him. The certainty required is that which will enable him to plead the verdict in bar of any future action.

It is alleged, in this count, that this conspiracy was to go into operation at an election not yet held, to wit, the third Wednesday of October, 1872, and it is objected that this is not sufficient, that the right to vote is not a continuing right, but exists only at the time of its immediate exercise. It would be strange, indeed, if parties could not be punished, if it be necessary to punish them at all, for any offence but those committed against this act on election day, and in the direct exercise of the elective franchise.

The usefulness of the act of Congress would be entirely frus-

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trated by such requirement. A man may be so effectually intimidated weeks before the election that he would not dare to go within a mile of the polls, and all the mischief the act is intended to remedy would flourish, and no punishment could be awarded them, under this construction, because the right to vote is not a subsisting right, but one which recurs to the citizen on election day. We do not so hold.

The uncertainty which the count leaves as to whether this was a State election or a Federal is urged as fatal. The indictment charges that this was a conspiracy to violate the first section of this act. This section declares that all citizens shall be allowed to vote at all elections, who are qualified by law to vote, without distinction of race, or color, or previous condition of servitude.

Congress has never assumed the power to prescribe the qualifications of voters in the several States. To do so is left entirely with the States themselves.

But the Constitution has declared that the States shall make no distinction on the grounds stated in this first section. And, by this legislation, Congress has endeavored, in a way which Congress thought appropriate, to enforce it. It is this act of appropriate legislation, and the first section of it, which the defendants are charged with violating, and we think it makes no difference at what election, whether it be State or Federal, he is intimidated or hindered from voting because of his race, color, or previous condition of servitude.

Congress may have found it difficult to devise a method by which to punish a State which, by law, made such distinction, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a State law or upon his individual responsibility.

If the act be within the scope of the amendment, and in the line of its purpose, Congress is the sole judge of its appropriateness.

The next objection, which is that the count does not set forth the qualification of the voter, is sufficiently answered, we think, in the remarks we have made respecting the requirements of indictments setting forth statutory offences.

We are of opinion that the second count of the indictment is

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bad, because it does not allege that Amzi Rainey was qualified to vote; and for another reason, more fatal, that it alleges the right of Rainey to vote to be a right and privilege granted to him by the Constitution of the United States.

This, as we have shown, is not so. The right of a citizen to vote depends upon the laws of the State in which he resides, and is not granted to him by the Constitution of the United States, nor is such right guaranteed to him by that instrument.

All that is guaranteed is, that he shall not be deprived of the suffrage by reason of his race, color, or previous condition of servitude.

The third count is a repetition of the second, with a clause setting out a charge of burglary. Concerning the court's jurisdiction over such charge, the court is divided in opinion, and will, therefore, make no comment on it at this time.

The fourth count is obnoxious to the objection that neither the citizenship of Rainey nor the fact of his qualifications to vote is set out.

The fifth count repeats the charge contained in the fourth, with the additional clause contained in the third count, and the court refrains from noticing it for the reasons given as to the first count.

The sixth count is intended to charge a conspiracy to oppress Rainey for having prior to 1st February, 1871, exercised the right of suffrage; and would be good if it were drawn with the particularity of the first count, which charges a conspiracy to oppress, to prevent the future exercise of this right.

It does not, however, contain any allegation of the fact of qualification, nor that the party was entitled to vote in York County, or anywhere else, or that he ever exercised his right to vote.

The seventh count is a repetition of the sixth, with the charge of burglary added, as in the third count.

The eighth count alleges a conspiracy to prevent and hinder Rainey from the exercise of a right secured to him by the Constitution of the United States, which is defined to be the right to be secured in his person and papers against unreasonable search. The article in the Constitution of the United States, to enforce which this count is supposed to be drawn, has long been decided

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to be a mere restriction upon the United States itself. The right to be secure in one's house is not a right derived from the Constitution, but it existed long before the adoption of the Constitution at common law, and cannot be said to come within the meaning of the words of the act "right, privilege, or immunity granted or secured by the Constitution of the United States."

The ninth count is entirely too indefinite, and the defendants could not possibly know, from its language, with what offence they were charged; and the same objection is valid as to the tenth count.

The eleventh and last count of the indictment charges a conspiracy to injure Rainey because he had previously voted for a member of Congress. We have no doubt of the power of Congress to interfere in the protection of voters at Federal elections, and that that power existed before the adoption of either of the recent amendments. It is a power necessary to the existence of Congress, and this count seems to set forth the charge with sufficient perspicuity, and is not liable to the objections urged against it.

The motion to quash is overruled as to the first and eleventh counts of the indictment, and sustained as to the others, excepting such as the court is divided respecting.

D. T. Corbin and D. H. Chamberlain, for the United States.

W. B. Wilson and C. D. Malton, for the defendants.

*United States Circuit Court, District of South Carolina,
April, 1877.*

UNITED STATES v. A. R. BUTLER *et als.**

It is not necessary that the finding of a grand jury upon a bill of indictment presented by them should be read in open court.

* This report of the case has been prepared for this volume by William Stone, Esq., late United States Attorney for South Carolina.

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The handing of the bill to the clerk in open court, and the entry of it by him on the records, is a sufficient publication of the finding of the grand jury.

A challenge to the array of the grand jury cannot be made after the jury is organized and has entered upon its duties.

The jurisdiction of the United States Circuit Court for the district of South Carolina extends throughout the entire State.

The district attorney is not bound to furnish the defendants with the names of the prosecutor and witnesses in a criminal case not capital.

In challenging the petit jurors, the right of peremptory challenge need not be exercised until the opportunity of rejecting for cause is afforded.

In presenting jurors for challenge, the government must first exercise its right, and then the defence.

As the government is allowed the right of peremptory challenge, it cannot ask a juror to stand aside until the panel is exhausted before challenging for cause or peremptorily.

It is a good cause of challenge to a juror, that he has voluntarily joined the rebellion. (See section 820, Revised Statutes)

To convict under this indictment, for conspiracy contrary to the provisions of sections 5508 and 5520, Revised Statutes, it is not necessary to find that the conspiracy charged was formed against the voter named in the indictment alone. It is sufficient if it is made to appear that he was included among persons actually conspired against.

Every member of a conspiracy is responsible, personally, for the acts of every member thereof, done in furtherance of its illegal purposes, whether he be himself present or not.

A "reasonable doubt" is something more than a captious doubt. It must be a doubt for which a reason can be given.

All citizens of the United States, whether white or black, are included within the protection of the statute alleged to have been violated by the defendants.

THIS was an indictment for conspiracy against one David Bush to prevent him from giving his support in favor of the election of one Robert Smalls as a member of Congress, etc.

The indictment was drawn under the provisions of sections 5508 and 5520 of the Revised Statutes of the United States.

It consisted of five counts as originally drawn, but the first count was held bad upon demurrer.

The indictment was as follows, the formal parts being omitted :

FIRST COUNT. That Andrew Pickens Butler, George W. Croft, August P. Brown, Abner W. Atkinson, George W. Bush, George B. Bush, Paul F. Bowers, Augustus McDaniels, William S. Bush, John Bowers, Whitmore W. Stallings, and John M.

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Bush, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken County, South Carolina, on the 18th day of September, A.D. 1876, at Aiken County, in the State of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire together to prevent, by force, intimidation, and threat, one David Bush, a male citizen of the State of South Carolina, and of the United States, who was then and there lawfully entitled to vote at any election by the people in said county, State, and district, from giving his support and advocacy in a legal manner toward and in favor of Christopher C. Bowen, John Winsmith, Thomas B. Johnston, Timothy Hurley, William B. Nash, Wilson Cooke, and William F. Meyers, lawfully qualified persons, as electors for President and Vice-President of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

SECOND COUNT. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the said jurors now unknown, late of Aiken County, in the State of South Carolina, on the 18th day of September, 1876, at Aiken County, in the State of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire together to prevent, by force, intimidation, and threat, one David Bush, a male citizen of the United States and of the State of South Carolina, who was then and there lawfully entitled, as an elector, to vote at any election by the people in said county, State, and district, from giving his support and advocacy in a legal manner toward and in favor of the election of one Robert Smalls, a lawfully qualified person, as a member of the Forty-fifth Congress of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

THIRD COUNT. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid now unknown, late of Aiken County, in the State of South Carolina, on the 18th day of September, in the year 1876, at Aiken County, in the State of South Carolina, in said district and within the jurisdiction of this court, unlawfully did conspire together to injure in his person and property one David Bush, a male citizen of the United States and the State of South Caro-

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lina, of African descent, who, then and there, was lawfully entitled to vote at any election by the people in said county, State, and district, on account of his giving his support and advocacy in a legal manner in favor of the election of one Robert Smalls, a lawfully qualified person, as a member of the Forty-fifth Congress of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

FOURTH COUNT. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken County, in the State of South Carolina, at Aiken County, in the State of South Carolina, in said district, and within the jurisdiction of this court, on the sixteenth day of September, in the year eighteen hundred and seventy-six, unlawfully did conspire together to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, and of the State of South Carolina, of African descent, of the age of twenty-one years and upwards, and duly qualified to vote at any election by the people in said county, State, and district, in the free exercise of the right and privilege secured to him by the laws of the United States, to wit, in the free exercise of the right and privilege secured to him by section two thousand and four of the Revised Statutes of the United States to vote at a general election by the people, held on the Tuesday next after the first Monday in November, A.D. one thousand eight hundred and seventy-six, without distinction of race, color, or previous condition of servitude, on account of the race and color of him, the said David Bush, contrary to the provisions of section five thousand five hundred and eight of the Revised Statutes of the United States, etc.

FIFTH COUNT. That said Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken County, South Carolina, on the sixteenth day of September, A.D. eighteen hundred and seventy-six, at Aiken County, in the State of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, and of the State of South Carolina, of African descent, of the age of twenty-one

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years and upwards, and duly qualified as an elector, to vote at any election by the people in said county, State, and district, for representatives in the Congress of the United States, in the free exercise of the right and privilege secured to him by the laws of the United States, to wit, in the free exercise of the right and privilege secured to him by section two thousand and four of the Revised Statutes of the United States to vote, without distinction of race, color, or previous condition of servitude, for a representative in the Congress of the United States from the Fifth Congressional District of the State of South Carolina, at an election held on the Tuesday next after the first Monday in November, A.D. one thousand eight hundred and seventy-six, on account of the race and color of him, the said David Bush, contrary to the provisions of section five thousand five hundred and eight of the Revised Statutes of the United States, etc.

On the case being called, on motion of the defendants' counsel, the case against A. K. Butler was continued, on the ground that *P.* he was a member of the State Senate of South Carolina, which was then in session.

The counsel for the defence moved that their clients be not compelled to answer to the indictment, on the ground that it was not a legal indictment, as there had been no formal publication of the finding of the grand jury in court.

Judge Bond stated that he remembered the circumstances of the finding of this indictment. It had been brought in by the grand jury, the foreman had handed it to the clerk, by whom it was handed to the court for inspection, and afterwards it was handed back to the clerk for entry. The names of the grand jurors had been called out, and they had been asked if this was their finding, and they had answered that it was.

That the handing of the indictment to the clerk, and the entry of it on the record was all the publication ever intended. It was not meant that the whole world should know who were indicted, and for what offences, because the accused could then escape.

Chief Justice Waite stated that he had never known any other practice.

The counsel for the defendants continued to urge their objection to the indictment upon this ground, but the court adhered

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to its ruling. The defendants' counsel then challenged the array of the grand jury on several grounds, the principal of which were the following:

The grand jurors who were summoned and appeared at the present term of the court were not designated, according to the mode of forming such juries, then practiced in the State courts of the State of South Carolina so far as such mode was practicable in this, that the commissioners who selected the citizens whose names were placed on the jury list, were designated by officers in the judiciary department of the United States government, and were not officers elected by the people, nor appointed by the executive department, as are the like jury commissioners elected and appointed by the State laws which regulate the practice of forming juries in the State courts, and that for the purpose of forming said juries, neither the Rule LI of the circuit courts of the United States for the district of South Carolina, nor the order of the Circuit Court of December 8th, 1876, under which the said juries were formed, conformed the designation and impanelling of juries to the laws and usages relating to jurors in the State courts, in force in said State, at the date of such order as required by section 800 of the Revised Statutes of the United States.

That the commissioners so designated by the order of the court for the selection of said juries were themselves officers of the government, and were not calculated to be most favorable to an impartial trial in cases of prosecutions by the government.

That the writs of venire were served and returned by the United States marshal for the Eastern District of South Carolina, R. M. Wallace, Esq., who is not "an indifferent person," as required by section 803 of the United States Revised Statutes.

That the array of grand jurors returned and accepted is composed of five persons who are not in the venire, and are not returned as additional grand juries as required by section 808 of the United States Revised Statutes, having been returned as additional jurors by the United States marshal under an order of a judge of the United States court, not issued in the case contemplated by said section, viz., "If, of the persons summoned, less than sixteen attend, they shall be placed on the grand jury,

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and the court shall order the marshal to summon, either immediately, or on a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury ;" whereas these challengers say that eighteen of the grand jurors summoned appeared, and the additional grand jurors summoned by said order were not necessary to complete said grand jury.

The additional grand jurors so summoned were not from the body of the district, as required by section 808 of the Revised Statutes.

The commissioners designated by the said order of 8th December, 1876, were not persons residing in the Eastern District of South Carolina.

The citizens selected by the said commissioners were not selected from the several counties composing the district of the State in which the trial is proposed to be had, in which the accused reside, and in which the alleged offences were said to have been committed, viz., the Eastern District of South Carolina ; but a portion of the citizens so selected were selected from counties within the Western District of said State.

The court disallowed the challenge to the array on the ground that such a challenge must be made before the jury is impanelled, and that it cannot be made after it has been organized and has entered upon the discharge of its duties.

As to the objection that the grand jurors were not all drawn from the *Eastern* District of South Carolina, the court held :

"As to the question of the jurisdiction of this court throughout the entire State of South Carolina, we decide, for the purposes of this trial, in favor of the jurisdiction. This is in accordance with the uniform practice of the court, without objection from any quarter, for nearly half a century. If, after the trial, it is thought desirable to bring the point again to our attention we will consider it, and, in case of disagreement between us as to its proper determination, certify it to the Supreme Court for decision."

It was then moved to quash the indictment upon the same grounds as those urged in the challenge to the array, but the court overruled the motion.

A demurrer was thereupon filed to the indictment.

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The grounds of demurrer were substantially as follows :

As to the first count—

(1.) That the force, intimidation, and threat therein charged are not particularized.

(2.) That the support and advocacy therein set forth are not particularized.

(3.) That the legal manner of giving such support and advocacy is not particularized.

(4.) That the support and advocacy are not stated to be in favor of the persons named as electors.

(5.) That the persons named as electors are not stated to have been qualified at any time or place.

(6.) That no place in Aiken County has been specified as the place where the alleged conspiracy was formed.

(7.) That no election, nor time, nor place thereof is alleged.

As to the second count—

Same as to first count except

(4.) That Robert Smalls is not stated to have been a lawfully qualified person as member of Congress at any time or place.

(5.) That it is not stated that the said Robert Smalls was a candidate.

(6.) That it is not stated from what State or Congressional district said Robert Smalls was to be elected, nor from what Congressional district he was a lawfully qualified person as a member of Congress.

As to the third count—

Same as first count, except 2d and 5th grounds.

(2.) That no mode or means of injuring the said David Bush in his person or property is alleged.

(5.) That it is not stated from what Congressional district the election of said Robert Smalls was sought to be supported and advocated, nor from what election district he was a lawfully qualified person as a member of Congress.

That as to all of said first, second, and third counts in said indictment, race, color, or previous condition are not alleged to be the motive or object of said conspiracy.

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As to the fourth count—

(1.) That the injuring, oppressing, threatening, and intimidating therein charged are not particularized.

(2.) That the description of general election and of the people who were to vote thereat is too vague and indefinite.

(3.) That the election mentioned therein is described as an election held, and not as one to be holden.

(4.) That David Bush is alleged as qualified to vote without specification of time or place.

(5.) That the race and color of said David Bush, on account of which the offence is alleged to have been committed, are not specified.

(6.) That the right and privilege therein alleged to be secured to the said David Bush by section 2004 of the Revised Statutes of the United States as matters of law, are not secured by said section.

(7.) That section 5508 does not prohibit or punish the violation of the specific rights declared and set forth in section 2004, and the alleged violation of rights and privilege specifically declared in section 2004 is not in law contrary to the provisions of section 5508, as alleged.

As to the fifth count—

Same as to the fourth count except third.

(3.) That no such election as that at which David Bush is alleged as duly qualified as an elector to vote, can be holden.

As to all of said counts—

(1.) That no one of said counts alleges with sufficient particularity the election at which David Bush was lawfully entitled to vote.

(2.) That the conspiracy charged in each and every count is alleged in terms too vague, general, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and they set forth no specific offence under the law.

(3.) That no one of said counts contains a charge of criminal matter, indictable under the Constitution and laws of the United States.

(4.) Because each of the sections under which this prosecution

The evidence.

is prosecuted, in so far as it creates offences and imposes penalties, is without warrant from the Constitution, and is an infringement of the sovereignty of the States and the people.

(5.) That this court has no jurisdiction to take cognizance of the offences set forth in any of said counts.

(6.) That no criminal intent is alleged in any one of said counts.

After argument by the defendants' counsel and the counsel for the United States, the court, by WAITE, C. J., pronounced the following opinion as to the demurrer :

The first count is bad. Section 5520 makes it an offence to conspire to prevent by force, etc., any citizen, etc., from giving his support or advocacy, in a legal manner, toward or in favor of the *election* of any legally qualified person as an elector for President or Vice-President.

In this count the allegation is not that the support or advocacy to be prevented was of the *election* of the persons named as electors, but of the persons themselves. The offence consists only in the conspiracy to prevent the support and advocacy of the election.

The demurrer to this count is, therefore, sustained.

As to the other counts the demurrer is overruled, without prejudice, however, to the rights of the defendants to renew their objections upon a motion to arrest, if they shall so desire.

The defendants thereupon severally pleaded "not guilty."

The counsel for defence asked that they be furnished by the district attorney with the names of the prosecutor and the witnesses, but the Chief Justice stated that there was no practice justifying such a demand.

It was then moved that the government be required to elect one of the four counts of the indictment upon which to proceed. The counts charge offences under different statutes, the penalties being different. They also charge offences growing out of different transactions, and they charge offences growing out of transactions on different days, the offences charged in the first two counts being alleged to have been committed on the 18th September, and those in the last two on the 16th September.

The evidence.

Judge Bond announced the decision of the court that there was no reason to compel the government to elect at that stage of the proceedings.

Counsel for the defence then asked the privilege of entering a challenge to the array of the petit jury (*pro forma*), on the same grounds as the challenge to the grand jury. Granted.

Mr. Youmans, for the defence, said that before the clerk proceeded to impanel the jury he would like to ask for information whether the peremptory challenges must be exhausted before any challenge for cause was made, or *vice versa*, or whether it was a matter of indifference.

Judge Bond replied that counsel might do either one or the other, but as there were only three peremptory challenges, it would be very foolish to exhaust them before challenging for cause.

After some further discussion it was decided that each juror should be subject first to the challenge of the government, and afterwards of the defence.

The impanelling of the jury was proceeded with, until one Haines was called.

He was examined on his *voir dire*, and was then told by the counsel for the government to stand aside.

The defence objected, and insisted that the prosecution must either exercise its right of challenge or waive it entirely and at once.

For the prosecution it was contended that the right of qualified challenge in the courts of the United States was sustained by the Supreme Court of the United States in the case of *The United States v. Marchant & Colson*, 12 Wheat., 480.

The rule laid down in that case was subsequently followed in the Circuit Court for the Eastern District of Pennsylvania in the case of *The United States v. Wilson and Porter*, 1 Bald., 78.

The court held that this rule was in force when the government had no right of peremptory challenge, but as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing with the defence, and either exercise the right of challenge at once or not at all.

When Hutson Lee was called, and while under examination

The evidence.

on his *voir dire*, he was asked whether he had not voluntarily served in the confederate army. He replied that he had.

He was thereupon challenged for cause, in accordance with the provisions of section 820 of the Revised Statutes.

The counsel for the defence objected to the challenge on the ground that the disqualification had been removed, together with other disabilities. And on the further ground that Congress had no right to append a penalty to a statute regulating the qualifications of jurors.

The court decided that it was not a penalty, but a right of challenge given to the government by positive act of Congress, which the court had no choice but to observe until it was repealed.

The jury being impanelled, each juror was required to take and subscribe the special oath as provided by section 822 of the Revised Statutes.

The examination of witnesses continued for ten days. Only a brief narrative of the events testified to can be given.

To an understanding of them, a description of the place where they occurred is necessary.

The Port Royal Railroad extends from Augusta to Port Royal and Beaufort. It crosses the Savannah River a few miles below Augusta, at a point known as the Sand Bar Ferry.

A few miles below the point of crossing is a station called Jackson's.

Seven or eight miles further down is another station called Ellenton. Here is a settlement of some five or six families, containing about ten white male adults.

The county line separating Barnwell County from Aiken County is between two and three miles east of Ellenton.

A mile to the north of Ellenton is a stream which empties into the Savannah River, called the Upper Three Runs.

It is crossed at a point known as the Union Bridges, one and a half miles from Ellenton, and at Rouse's Bridge, four or five miles further up the stream.

Aiken and Augusta are each about twenty miles distant from these bridges, the former being nearly due north from them, the latter northwest from them.

The evidence.

Barnwell Court House is about eighteen miles due east from Rouse's Bridge.

No villages are between Ellenton or Rouse's Bridge and any of these points.

The government did not attempt to prove the existence of the conspiracy alleged in the indictment, except by circumstantial evidence.

The evidence for the prosecution was therefore directed to proof of acts done and declarations made by the alleged conspirators before and at the doing of the overt acts.

As to the acts proved :

On Friday, September 14th, 1876, one Peter Williams, a young colored man, was taken from the house of another colored man where he had been staying, by several white men, and told that he had to go to a trial justice's for an alleged assault on one Mrs. Harley and her son, a boy of nine or ten years of age.

He was taken to the road, where Mr. Harley, the husband of Mrs. Harley, and others were, was struck three times by him in the face, then, after turning away, and endeavoring to run from his captors, he was pursued and shot at, and severely wounded. From the effects of these wounds he died several days afterwards.

After he was shot he was put on a wagon by Harley and his friends, and taken to his (Harley's) house. Here Mrs. Harley was called out to see him. She said he was not the man who struck her.

While lying in the wagon, one of the white men put a pistol to his heel and shot him, the ball coming out at the calf of the leg.

He was taken a short distance up the road, thrown into a fence corner, and a white man stood guard over him, declaring that he should not be moved until he died.

Later that afternoon a writ was issued by Trial Justice Griffin (colored) for the arrest of this Peter Williams and one Pope for the assault on Mrs. Harley. Angus P. Brown, one of the defendants, was deputed as a special constable to serve it.

On Saturday the whites, to the number of nearly two hundred, gathered near Mrs. Harley's with arms and mounted.

The evidence.

Harley lived seven or eight miles northwest from Rouse's Bridge.

The whites, under command of Angus Brown, left Harley's Saturday afternoon to go in the direction of Rouse's Bridge. They passed the store of one Chavis, where a few colored men had been in the habit of meeting on Saturday afternoon to talk over matters of interest to them. The members were Republicans.

As the whites passed the store they made threats against a prominent colored Republican named Holland, who had been a trial justice in Aiken County.

Afterwards a large body of armed white men gathered in the neighborhood of Hamburg, and went down towards Rouse's Bridge to join Brown's forces.

Saturday night many of the whites staid at Matlock Church, a few miles northwest from Rouse's Bridge.

Sunday afternoon they went towards the bridge. The main body numbered between two and three hundred. The Hamburg company had joined them at this time.

Colonel A. P. Butler had met Captain Angus Brown on Saturday, and on Sunday he had command of the whites. They halted in an old field, a short distance from the bridge, and remained there some time.

While they were there, three colored men were shot. One of them, Henry Campbell, was trying to escape from some whites who had taken him prisoner, and who had taken away from him his gun. He afterwards died from his wounds.

The two others were without arms when shot, and were trying to get out of the way of the whites.

The movements of the whites had alarmed the colored men, and a small party of them were near Rouse's Bridge on Sunday. Some of them had arms.

After three of their number had been shot, the whites sent to them to have a "compromise."

Six from each side went near Weatherby's store, a short distance west of the bridge.

The whites said they had a warrant for Frederick Pope, and exhibited it.

The evidence.

The colored men said he was not with them, and that if they found him they would take him to Aiken and deliver him up.

Both parties then agreed to go home.

That afternoon, on the south side of the Union Bridges, some of the colored men had assembled at a place where they held their religious meetings. They were greatly alarmed at the action of the whites, and most of them concluded to sleep in the woods that night, and remain together as much as possible.

Just at dusk, some of the whites who had been at Rouse's Bridge came across Union Bridges on their way home. They passed the colored people without molestation. A gun was fired after a man named Ashley had passed. It was probably discharged by one of the negroes. No one was injured by it.

Soon afterwards a body of whites came up to the bridge and fired into the negroes, killing one of their number, Basil Bryant, instantly.

Some of the negroes then returned the fire, and a fusilade was kept up a few minutes from both sides. No serious injuries followed.

The whites turned back and the negroes remained in the swamp near the bridge.

Monday, the negroes from the neighborhood of Rouse's Bridge came to Union Bridges. They consulted together as to their course. They then went to Ellenton to the number of seventy-five or one hundred. Many had arms. They remained there an hour or so. Here they were met by one Simon Coker, a colored man, who was a member of the legislature from Barnwell County. He lived at Robbins's, a station on the Port Royal Railroad, seven miles southeast from Ellenton.

Coker advised them to go home, as he didn't think the white people would trouble them. They took his advice and left in the direction of their homes.

Sunday night most of the whites remained at Myers's, eight or ten miles from Rouse's Bridge, on the Augusta road. Sunday afternoon a messenger was sent to Aiken, and Captain G. W. Croft took command of a party of white men, who left there late Sunday night for Ellenton.

But the colored people had sent messengers to Aiken, who had

The evidence.

reported on Sunday afternoon to the sheriff of that county that the whites were shooting some of their men, and asking him to go down and protect them from further violence.

He did not conclude to go until Monday morning. When he did leave he took along his son and three other white men as a posse. He reached Myers's that afternoon and remained there.

Croft's company joined the whites about Cowden plantation, near Jackson's Station. The entire body, under Colonel Butler, went towards the railroad.

A freight train had run off the track that morning one and a half miles below Jackson, and the engine and some cars had fallen over on the side of the track. As the whites advanced their skirmishers were thrown out, and by some of the number a negro named Finissee, seen near the track, was shot to death. He was unarmed at the time; after he was shot his right ear was cut off.

The whites then proceeded towards Ellenton, crossing the runs at Union Bridges.

On their way, a portion of the column went to the house of a colored woman named Joanna Bailey. Two of the defendants, Paul and John Bowers, went into the house and found there one Wilkins Hamilton, a nephew of Joanna. He had been shot in the leg the night before at Union Bridges.

He was unarmed when these two entered the house, and offered them no resistance.

Five pistol-balls were shot into him by these two men, in the presence of his aunt, killing him instantly.

They rejoined the column, and proceeded with it to Ellenton. Near the station they killed another colored man, John Kelsey, who was trying to escape from them.

Afterwards the column turned and went by the house of some colored people named Kelsey. Six young colored men had eaten dinner there. As they heard the advancing column of mounted men they ran from the house.

David Bush and Sam Brown, a deaf and dumb boy, were killed by the whites in the field near the house.

Warren Kelsey was killed in his yard, in the presence of his wife and family, while begging for his life and promising to vote the Democratic ticket.

The evidence.

The whites, after going about a mile beyond this place, returned to Ellenton.

The main body of them encamped there that night.

The following morning the whites moved towards Rouse's Bridge, by the road on the east side of the runs.

The negroes who were in the swamp above the bridge heard a great shouting from the women about nine o'clock in the morning, that "the Yankees had come." They therefore came out of the swamp, and found that a detachment of United States troops, under the command of Captain Lloyd and Lieutenant Hinton, had marched from Aiken pursuant to orders from General Ruger, to see what was going on. They halted not far from Rouse's Bridge, on the west side of the runs.

The negroes were delighted at the arrival of the United States soldiers. Some of them were on their knees praying, and saying "Thank God! the Yankees have come."

As some of the negroes came up there was firing heard towards the swamp, and the officers were told that the whites had shot one of the colored men.

Presently there was a cry, "Here they come."

Captain Lloyd and Lieutenant Hinton looked down the road and saw an armed body of white men approaching.

They walked down the road to meet it.

They stopped and spoke to one man at the head of the column. While they were talking with him Colonel Butler came up and asked what they proposed?

They replied they had nothing to propose.

Afterwards Captain Croft and another man were sent to them by Colonel Butler, and they were asked what their orders were. They said simply to preserve the peace.

Croft asked if they would disperse the negroes should the whites leave for home.

They replied they would advise them to go home, and had no doubt they would do so.

In about half an hour the whites rode off in the direction of Myers's and Augusta.

The officers estimated the number of white men at between 300 and 400, all well armed and mounted.

The evidence.

The negroes in the swamp were estimated at from 75 to 100, and their arms were very poor ; many had no arms at all.

About the time of the conference between the army officers and Colonel Butler at Rouse's Bridge, a party of white men who had remained at Ellenton, and who were apparently under the orders of O. N. Butler, of Augusta, went to Robbins's Station on the Port Royal road. A construction train and a passenger train went down there, and the party under Butler found Simon Coker, who has been before alluded to as the man who had been at Ellenton the day before, and who had advised the negroes to disperse.

He was going to the railroad station for the purpose of going down the road to Tennessee. He had his satchel in his hand, and was unarmed when taken prisoner by Butler's men. Both trains backed up to Ellenton, and Coker was taken out of the car.

He was surrounded by many of the white men, and did not seem to realize that his life was in danger.

About twelve o'clock, he was taken to an old field some 200 or 250 yards distant. The whites surrounded him, and a volley of bullets was shot into him, killing him instantly. He was left to lie where he had fallen, but after his death his pockets were examined by those who had participated in killing him.

O. N. Butler, with several of the men who were at Ellenton when Coker was killed, had come down from Augusta on Monday morning in the train, and had got off at Jackson Station with his men. They were all well armed.

They met the whites under command of A. P. Butler near the wrecked train on Monday forenoon, and went with them to Ellenton and co-operated with them on Monday forenoon.

On Tuesday afternoon, after Coker had been killed, a body of seventy or eighty white men, among whom were some of the men who had been with Colonel Butler at Rouse's Bridge on that morning when he said the whites would disperse and go peaceably to their homes, came to a field by the roadside about three miles below Ellenton, in which were William Goodwin and his son Charles, and Robert Turner and his son George, all colored, picking cotton.

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Robert Turner thus described what followed :

"They flung open the big gate, and they all poured in like a storm, and went down to William Goodwin and took him and carried him outside of the fence, and enlisted him with the horse company ; and my son had gone outside in the wood whilst they were tangling about, and he came back in the house and got in the house and sat down. . . . They hunted all about in the cribs and the fodder-loft and everywhere else. They spied him, I suppose, when he went off out of the field. They couldn't find him.

"After awhile two of them went into the house. . . . They took him out of the house. His wife beckoned to me. . . . I went to them and begged them not to kill my son ; he was sick, and I knew he never would go out in any riot. I asked them, 'Please not to kill him ; he is a poor sickly creature, and he never got in any disturbance.' . . . Then they carried him off in the woods, him and William, to a thicket by the side of the branch, and killed him. . . . I took my little wagon, and went and found him dead, and hauled him and fixed him and buried him."

William Goodwin's body was found the next day, with nine bullet-holes through it, in the swamp about one hundred yards from where George Turner had been killed.

On the following Thursday a body of armed white men, some of whom were proved to have been at Rouse's Bridge on Tuesday when the whites promised to go home peaceably, went to the house of Dick Thompson (colored), a few miles from Rouse's Bridge, in Barnwell County. Here they found Thompson and one Edward W. Bush. Both were in the house unarmed, sitting on a bed.

They were taken out of the house and carried down a lane. Thompson was allowed to go back. Bush was taken down to the foot of the lane, and in about half an hour three of the white men fired each two shots into him, killing him instantly. His wife was at the house with three young children when he was taken out, and the children called to the men "Don't kill papa."

To prove the motive for the killing of these thirteen men whose deaths have been referred to, the prosecution introduced declarations of the alleged conspirators.

The defendant, Atkinson, told Moore, one of the witnesses, before the occurrences, that the leading rascals of the Republican party were going to be killed before the election. That

The evidence.

the Democrats would wade to their saddle-skirts in blood to carry the election. He advised Moore to join a Democratic club or he would not live until the election.

The defendant, George W. Bush, told David Bush, in the presence of his wife, about two weeks before the riot, that he could not remain on his place unless he voted the Democratic ticket or refused to vote at all.

On the morning of the day on which David Bush was killed, George W. Bush came to David's house. He was absent, but his wife was at home. About thirty armed and mounted white men were with him. He took out a list which he called a "dead list," and read from it the names of several prominent colored Republicans in that vicinity who were to be killed. On this list was the name of her husband.

That evening, after her husband was killed, George W. Bush, with some of the men who were at her house in the morning, rode up. Bush with three or four others came to the house and told her her husband was killed, and his body was under a persimmon tree in the Kelsey field.

On Monday, one Darius Weathersby (colored) was taken a prisoner by the whites. He was asked if he ever voted and if he would vote the Democratic ticket if turned loose. Some of the men said they were going to kill the leading men.

John Scott was taken a prisoner the same day, and remained under guard that night. The white men told him that night they were going to kill every d——d negro in the country. It was the leading men they wanted. They said they were going to breakfast on Simon Coker.

One of the white men got Scott off at daylight, and told him the men would kill him. He hid him in a store at Ellenton and saved his life.

One Anselen Kelly heard a conversation between two of the whites engaged in the riots some time before they took place. One of them in discussing the political campaign said that the plan was to kill eight or ten leading Republican negroes, and they could manage the balance.

Berry Riley was told that if he voted the Republican ticket

The evidence.

he would die, that the Democrats intended to carry the election if they had to wade to their saddle-skirts in blood.

Willis Leddick heard the men of the company that went from Hamburg to join Captain Brower, on Saturday, September 16th, say they were going down to get Mink Holland, and stick his head up in Edgefield; that they were after the leading men; that this was a white man's government and they were going to have it.

Columbus Roundtree was told that the whites intended to adopt the Mississippi plan—kill a few of the niggers and scare the balance.

The defendant, George W. Bush, said that the riot was not started altogether in behalf of Mrs. Harley, but to win the election.

Two colored men who had been sent to Aiken on Sunday for the sheriff, were captured by the white men going from Aiken to Ellenton, when about one and a half miles from Aiken. They were compelled to go back home as prisoners.

About four miles from Aiken they were compelled by some of these men to get down on their knees, and made to swear that they would vote the Democratic ticket.

Colonel A. P. Butler asked Bryant Council, who was taken prisoner by the whites on Monday, what his politics were. He replied that he had not determined. Butler told him to fall in line. Some of Butler's men struck him over the head with a gun.

Albert Carroll was told that the whites were going to carry the election on the Mississippi plan, the shotgun policy.

H. J. Miller (white) told Carroll a week after the Hamburg riot that the Democrats intended to carry the election if they had to kill every negro in the whole country.

(Miller was on the stand as a witness for the defence, and did not deny this fact.)

O. N. Butler was consulted by the whites as to what should be done with Coker. He said, "Kill him; all we want to do is to kill the leaders and then we can rule the others."

In reply to the testimony adduced for the prosecution the defence introduced evidence tending to show that the gathering of whites on Saturday and Sunday was for the purpose of assisting

The evidence.

Captain Brower in executing the warrant for the arrest of Frederick Pope.

That the conduct of the whites subsequently was justified by the action of the negroes, and that they were simply engaged in quelling a riot.

That most of the negroes who were shot or killed on Sunday and Monday were the aggressors, and were shot in self-defence.

It was shown that Mrs. Harley and her son had been assaulted on Friday by two unknown negroes. Suspicion rested on Peter Williams and Frederick Pope.

Williams was captured, was struck in the face by Mr. Harley, then attempted to run and escape, but was pursued, shot, and afterwards carried into Harley's house. Mrs. Harley at first said he was the wrong man, but after seeing his face she said he was one of the men who was at the house, but not the one who struck her.

That afternoon Trial Justice Griffin issued a warrant for the arrest of Williams and Pope, and appointed A. P. Brower special constable to serve it. No return was ever made upon the warrant.

Saturday afternoon the whites gathered at Harley's, and started towards Rouse's Bridge to arrest Pope. Many of them slept at Matlock Church that night. Sunday morning they went on towards the bridge. That morning, Dunbar Lamar came for Trial Justice Griffin saying that Colonel A. P. Butler had sent for him. He went to within a short distance of the bridge, and found Butler there with about eight hundred white men. Butler requested him to go down and talk to the colored people; that he wanted to make one more effort to quell the riot.

In regard to the shooting of Henry Campbell on Sunday morning, one Tavell swore that he saw a colored man in the field raise a gun and shoot, and that his mule was struck with shot. That he then fired, and shot the man apparently in the arm.

Two witnesses, Ransom and Page, testified that before Campbell was shot, they were surrounded by several negroes, and that threats were made to kill them. Page said he told the negroes

The evidence.

that they had a warrant for Pope, and that he saw him among them, but they said they intended to protect him.

At the conference held between the whites and negroes one of the negroes asked if the agreement for peace had anything to do with their voting. The whites replied that it had not.

Sunday afternoon the whites started to go towards their homes. Many of them remained all night at Myers's.

That afternoon, one Solomon testified that about sixty negroes were drilling in front of his store, which was a short distance to the north of Union Bridges.

Solomon made a list of their names in Hebrew, which his clerk, H. J. Miller, afterwards wrote out from his dictation.

Towards dusk some of the white people passed Solomon's store to go across the bridges towards their homes in the direction of Ellenton.

After four or five had passed, one Elmore Ashley passed on horseback. He testified that when about seventy-five yards from the bridge he was halted by some colored men there. One took his gun from him, but it was restored by another of the party. Some called out "Kill him!" He put spurs to his horse, and was fired at. Just as the gun was discharged his horse stumbled. He was not hurt.

Several white men then rode down towards the bridge and fired at the negroes. The fire was returned.

At the first fire from the whites Basil Bryant was instantly killed. A few of the white men were wounded with small shot.

The whites retreated. Some went back to Myers's and reported that the negroes had ambushed and killed some of their number.

Captain William D. Bush went to Augusta and reported all along the road that the negroes were rising and killing white men.

Small bands of armed negroes were reported at various points about Ellenton on Sunday.

Sunday night, about eight or nine o'clock, one John Williams (white) was killed near Cowden, a plantation between Jackson's Station and Ellenton.

He was with a man named Stallings when he was killed.

The evidence.

Stallings testified that he was shot by negroes who were in the woods.

Sunday night the telegraph wire was cut at the bridge just above Ellenton.

Monday the whites, in command of A. P. Butler, went to the wreck of the train on the Port Royal Railroad.

As they neared the road, there was a line of skirmishers deployed. A gun of some sort was fired by unknown parties, some of the shot from which struck one car of the freight train, while others struck the rails.

Soon afterwards a colored man was seen crossing the track, and was shot and killed by the whites. (This man was Kit Finissee.)

Colonel Butler sent orders to the skirmishers after this man was shot to be careful not to shoot their own men.

O. N. Butler and some men from Augusta were met at this place. They joined the column and remained with it the rest of the day.

From Cowden the whites went to Ellenton. On the way several prisoners were taken.

On arriving at Ellenton, a negro fired into the whites from behind a wood-pile. He was killed. (This was John Kelsey.) No body of negroes at Ellenton then.

There was a great deal of shooting by the whites at Ellenton in all directions.

From Ellenton the whites went towards the Kelsey House and the plantation of Major Crossland, half a mile or more beyond there. As the head of the column neared the Kelsey House six or seven men ran out and fired.

The column was well closed up. No white man was shot. The whites then fired and killed three of the men. The others escaped.

After going up as far as Major Crossland's, the column returned to Ellenton by another road. A company of white men from Edgefield joined Butler at this time.

A. C. Jordan, a son of the sheriff of Aiken County, met Butler at Crossland's.

The evidence.

He had left Aiken in company with the sheriff about ten o'clock that morning.

When within a few miles of Rouse's Bridge, the sheriff turned to go in that direction, as it was there that the negroes were who had sent for him.

His son told him it would not be safe to go that way. They therefore went to Myers's, which they reached about three o'clock.

The sheriff remained there, and told his son to go to Rouse's Bridge and to tell Colonel Butler, or whoever was in command, that he thought the whites were in the right this time, and that if he wanted any assistance in quelling the riot to let him know, and he thought he could get them.

Butler said he thought he had sufficient men to quell them. He said he had been asked to go to Ellenton, as the negroes were massed there.

The whites remained at Ellenton that night, and put out pickets. A detachment under Captain Brown went across Union Bridge and staid there all night.

Monday evening a party of white men from Barnwell were fired into about a mile from Robbins's Station, on the road to Ellenton. They were going to Ellenton. It was dark, and it could not be told who did the shooting. One Robert Williams was killed. Two others were wounded. Whites returned the fire. The whites fell back to Steel Creek Bridge.

On Tuesday the main body of whites left Ellenton about seven o'clock to go to Rouse's Bridge, where the negroes were reported to be massed.

The son of the sheriff, when nearing the bridge, was in command of the skirmishers on the left of the road. The skirmishers were dismounted. In their front were mounted "scouts."

Some of the scouts testified that two negroes fired into them as they neared the bridge. Several of them returned the fire.

By this time there was a great shouting across the bridge.

When they reached the bridge the planks were off. The stream was forded, and the skirmish line advanced on the other side.

It was then that the whites met the army officers. After the

The evidence.

whites had agreed to disperse and go home, a request was made for volunteers to go to Ellenton, but Colonel Butler did not wish the men to go.

Dr. William S. Cannon testified that he was at Ellenton on Tuesday. Saw Coker there, and spoke to him. Didn't know the white men who had him in charge. They were mostly strangers. He remained at the station until about one o'clock, reading papers. When he left the depot he heard he had been shot half an hour before.

His killing didn't create much excitement. Nobody seemed to know or care anything about it. He went home and ate dinner. After dinner rode back and looked at his body. He estimated the number of white men who were at Ellenton on Monday afternoon at from three hundred to five hundred. Their column was about half a mile long.

Testimony was given tending to show that on Monday morning, at Union Bridges, some of the negroes were noisy and were calling for "white blood."

They had a drum Monday morning, and it was beaten when they went to Ellenton.

No one was injured by the negroes at Ellenton or elsewhere on Monday, and no property was destroyed by them, so far as appeared by the evidence.

A gin-house was burned on Sunday night some miles below Ellenton. It was not shown by what means it was set on fire.

It was also proved by the witnesses for the defence that several white families were at Myers's on Monday and Tuesday for protection.

On Wednesday night, September 20th, James Patterson, the sheriff of Barnwell County, was wounded in the face and breast by shots fired at him when near Ashley's, five or six miles from Rouse's Bridge, in Barnwell County.

He was riding in a buggy at the time with a friend. He could not tell who shot him. He remained that night at Ashley's, and went home the next day.

Trial Justice Griffin, a witness for the defence, testified that on Tuesday or Wednesday—he thought it was Tuesday—he held an inquest as to John Williams, the white man who was killed

The evidence.

Sunday night. The jury did not view the body. Testimony was taken and the jury returned a verdict that deceased came to his death from gunshot wounds inflicted by parties unknown. On cross-examination, he said that Mr. Paul Hammond advised him not to go home that evening after the inquest. He said he had promised his wife that he would do so if he were alive. A pass was therefore given him, which was produced. It was as follows :

SILVER BLUFF, S. C., September 18th, 1876.

Pass the bearer, Charles Griffin, on special business.

A. P. BUTLER,
PAUL HAMMOND.

The date is wrong. It should have been September 19th.

Griffin left about half-past three o'clock for home. He lived towards Augusta, in Beech Island, some ten or fifteen miles from Silver Bluff.

On his way home he was taken prisoner by a party of about thirty men, who were going towards Augusta. They cursed him, called him a d——d radical, and said they were going to kill him because he was a Republican. He pleaded for his life, and showed the pass which he had. They halted and consulted together, and finally released him. Before doing so, however, he promised not to vote the Republican ticket.

Afterwards, he came up to the main party. He promised them that if they would spare his life, he would not give any of the names that were there.

The witness was asked the names of any of the party. He replied that he could not give it, unless it were forced out of him. He was then asked if he felt that it would be unsafe to reveal the names now, and he said he believed the same party would, perhaps, hurt him if they could get him. Some of the same party he had seen on Sunday, at Rouse's Bridge.

In reply to the evidence for the defence, the prosecution introduced evidence to show that the colored men who were at Kelsey's did not fire guns at all.

Also that the firing on Tuesday morning, at Rouse's Bridge, was commenced by the whites. Matt Scott (colored) was shot,

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and still carries the bullet under the skin. He was unarmed. He said the bullets whistled around him "like bees around a gum."

His brother Isaac said he and Matt were going down the hill to cross the bridge, to get with the rest of the negroes. That he didn't know there were any white people near. They were shot at, and he was shot in the right thigh. He turned and ran up the hill. He ran twenty or thirty yards, then turned and fired his gun—an old shotgun. Then he ran across the hill, the white men after him. He fell into a deep gully, and thought that he thus saved his life.

The testimony having closed, and arguments having been made for the prosecution and defence, the Chief Justice charged the jury as follows :

The defendants, George W. Croft, Angus P. Brown, Abner W. Atkinson, George W. Bush, George B. Bush, Paul F. Bowers, Augustus McDaniels, William L. Bush, John Bowers, Whitmore W. Stallings, and John M. Bush, are on trial before you upon the second, third, fourth, and fifth counts of the indictment alone, as the first count has been adjudged to be insufficient in law.

The second and third counts are predicated upon section 5520 of the Revised Statutes of the United States, which, so far as it is applicable to this case, provides that if two or more persons conspire to prevent by force, intimidation, or threat any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as a member of the Congress of the United States, or to injure any citizen in person or property, on account of such support or advocacy, each of such persons shall be punished by fine or imprisonment, or both.

The second count charges, in substance, that the defendants, together with divers other persons, did unlawfully conspire together to prevent by force, intimidation, and threat, David Bush, a citizen of the United States, and of the State of South Carolina, and lawfully entitled to vote at any election by the people of Aiken County, from giving his support and advocacy, in a

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legal manner, toward and in favor of the election of Robert Smalls, a lawfully qualified person, as a member of the Forty-fifth Congress of the United States.

To convict under this count it is necessary for you to find from the evidence :

1st. That David Bush was a citizen of the United States, that is to say, that he was born or naturalized in the United States, and subject to the jurisdiction thereof.

2d. That he was lawfully entitled to vote at any election to be held in Aiken County for a member of the Congress of the United States, that is to say, that he was of the age of twenty-one years, or upwards, and had resided in the State of South Carolina one year, and in the county of Aiken sixty days, and that he labored under none of the disabilities named in the Constitution of the State.

3d. That Robert Small was a lawfully qualified person for the office of a member of the Congress of the United States, or in other words, that he had attained the age of twenty-five years, and had been seven years a citizen of the United States, and was an inhabitant of this State ; and

4th. That the defendants, or some of them, on or before the 18th of September last, unlawfully conspired among themselves or with others to prevent Bush, by force, intimidation, or threat, from giving support and advocacy to the election of Smalls as a member of the Congress of the United States.

The third count differs only from the second in that it charges the conspiracy of the defendants to have been to injure Bush in his person and property, on account of his having given support and advocacy, in a legal manner, in favor of the election of Smalls as a member of the Forty-fifth Congress.

To convict under this count, your findings must be the same as under the second, except in respect to the object of the conspiracy. As to that you must be satisfied from the evidence that the defendants, or some of them, unlawfully conspired among themselves or with others, with the intent to, and for the purpose of injuring Bush in his person or his property, because of his having given support or advocacy of the election of Smalls.

The fourth and fifth counts are predicated upon section 5508

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of the Revised Statutes of the United States, which provides among other things, that if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of having exercised the same, they shall be punished by fine and imprisonment, and shall be thereafter ineligible to any office or place of honor, profit, or trust, created by the Constitution or laws of the United States.

The fourth count charges that the defendants, together with divers other persons, to the jurors unknown, conspired to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, of African descent, and duly qualified to vote at any election by the people of Aiken County, in the free exercise of the right and privilege of voting at a general election by the people on the Tuesday after the first Monday in November, 1876, on account of his race and color.

To convict under this count you must be satisfied from the evidence:

1. That Bush was a citizen of the United States and a qualified voter of Aiken County, the same as under the former counts.

2. That the defendants, or some of them, conspired among themselves or with others to injure, oppress, threaten, or intimidate him in the free exercise of his right and privilege of voting at the election in November last; and,

3. That this was done on account of his race or color.

The fifth count differs only from the fourth in that it charges the conspiracy to have had special reference to the election of a member of Congress for the Fifth Congressional District of this State, to be voted for at that election.

The controlling element in the offence charged in both these counts is the race or color of Bush. It is not enough that the defendants may have conspired against him on account of his political opinions, or on account of his support or advocacy of any political party, for that is not the crime of which they are in these counts accused. In the second and third counts such is, in effect, the charge, but in the fourth and fifth it is not. To convict under the latter counts it must appear that the object of

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the defendants in their unlawful combination was to interfere with his right and privilege of voting on account of his race or color, without regard to his political belief or association.

As it appears from the evidence that Bush was killed on the 18th of September last, it follows that you must find that the conspiracy against him, whatever may have been its character, was formed on or before that day.

It has not been attempted on the part of the defence to contradict the evidence offered by the government to prove that Bush was a colored man, or that he was a citizen of the United States, or a lawfully qualified voter of Aiken County, or a member of the political party which, on or about the 15th of September last, put Smalls in nomination for election as a member of Congress for the Congressional district in which Aiken County is situated. It is not probable, therefore, that you will have any difficulty in arriving at a conclusion upon these preliminary questions. The real controversy before you is as to the existence of the alleged conspiracy. It is to this point that the evidence to which you have been listening with such attention for so many days has been principally directed.

And here it is proper to say in the outset that the defendants are not on trial for the killing of Bush, or of any other of the numerous homicides that were committed during the disturbances which followed the alleged attack by two negroes upon Mrs. Harley and her little son, near Silverton, on the morning of Friday, the 15th of September. The shocking details of these transactions, which have been given in evidence, are only to be considered by you with reference to their bearing upon the existence of the alleged conspiracy to prevent by force, intimidation, or threats the support and advocacy by Bush of the election of Smalls, or to intimidate him on account of his race or color in the free exercise of his right to vote. However much you may deprecate the acts which have been described by the witnesses, the punishment of those guilty of them has been committed by the laws to other courts than this. Power for that purpose exists in the government of the State, and under our political system the courts of that government can alone be resorted to for the trial and conviction of such offenders. But the acts

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themselves are proper subjects for your consideration, so far as they legitimately tend to prove the crime charged in this indictment, and which has been made an offence against the laws of the United States. It is not for you to consider whether these laws are wise or unwise. That was the duty of Congress when it passed them, and, having been passed, neither you nor the court have at this time anything else to do but to see that they are properly enforced. Their object is to protect the citizens of the United States in the lawful enjoyment of rights which have been secured to them by the Constitution and laws of the United States, and while in this case they have been resorted to on account of the alleged violation by white men of the privileges of colored men, they are equally open to the whites against the blacks, should occasion ever require. So far from arraying race against race, their object is to prevent such a calamity.

Neither are you to inquire at whose instance the indictment has been found or the trial had. Equally unimportant is it to you or to us whether the State or its officers have been unable or unwilling to punish offences against its own laws, or to bring to judgment in its own courts the violators of its own peace. It is enough for us that the government of the United States has seen fit, through its own appropriate department, to bring this case here for judicial investigation.

We do not propose to comment at all upon the evidence which has been adduced before you. You have listened to it patiently as it came from the witnesses, and we have no doubt will consider it in your room with all the care and judgment the importance of the case demands. The claims, both of the government and the defendants, have been argued before you by able counsel. There has been no attempt to establish the conspiracy which is charged by direct proof. No witness has been brought before you to swear that he was present when the unlawful combination alleged was in terms agreed upon by the parties or any of them. The testimony is wholly circumstantial, and consists of the acts and declarations of the parties named in the indictment, and of those who are alleged to have been their co-conspirators. In judging of the proper effect of these acts and declarations as evidence to sustain the indictment, you must consider them with

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reference to the circumstances under which the parties were placed at the time, and the rumors which, acting as prudent men, they would then have reasonable cause to believe were true.

On the part of the defendants it is claimed that at the commencement of the unfortunate occurrences which are in evidence, they were acting as officers of the law for the arrest and punishment of the two negroes who made the attack upon Mrs. Harley, and afterwards for the suppression of a riot which arose out of an attempt by the colored people in that vicinity to resist them in the performance of their duties. For this purpose it has been shown that a warrant was sued out before Trial Justice Griffin for the arrest of Peter Williams and Frederick Pope, charged with the alleged assault, and that Captain Brown, one of the defendants, was deputed as a special constable for its service. By the laws of the State every constable is a conservator of the peace, and may take into custody and carry to the nearest trial justice, any person or persons who may be, in his view, engaged in riotous conduct or open violation of the peace and refuse, upon his command, to desist therefrom; and also any person who may, in his view, commit any felony or misdemeanor; and for the purpose of preserving the peace, and also executing any criminal process. Every constable has the power of ordering out such posse comitatus to his assistance as may be necessary to enable him to discharge his duty.

In suppressing riotous assemblages, the officers of the law and those who assist them, in case of resistance, may attack, wound, and, if necessary, kill those who resist, taking care to commit no unnecessary violence or to abuse this power legally vested in them. Every one is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the color or pretext of the law. This is the language of Lord Mansfield, as it has been read to you by one of the counsel for the defendants in his argument, and correctly expresses the rule of law applicable to such a case.

You may properly be governed by this rule in the consideration of the evidence in this case. If the acts done by the defendants and those engaged with them in giving effect to their

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common purpose were no more than were necessary for the execution of the warrant which Captain Brown had for service, or the suppression of what was in fact, or may have been supposed to be, a riotous assemblage; if no unnecessary violence was committed, and the power which was lawfully vested in the officer and his posse was not in any respect abused, then you may with propriety conclude that the sole object of the parties was to execute the warrant and suppress the riot. But if you, on the contrary, find that unnecessary violence was employed and that illegal acts were wantonly committed, then you may with equal propriety further inquire whether the parties in their combined action had any other object in view, and if so, what it was. It is claimed on the part of the government that the process of the law was used only as a pretext, and that the real purpose of the parties was to carry into effect a conspiracy which had already been formed by them or some of them against Bush. This is the precise question which you are called upon to determine, and you are compelled to determine it upon circumstantial evidence alone. That kind of evidence, if full and complete, is as convincing as that which is called direct. But to warrant a conviction upon such evidence alone, the circumstances proven must not only be consistent with the theory of the guilt of the defendants, but they must be entirely inconsistent with any other rational conclusion.

To convict under this indictment it is not necessary to find that the conspiracy charged was formed against Bush alone. It is sufficient if it is made to appear to your satisfaction that he was included among persons actually conspired against. Neither is it necessary that he should have been mentioned by name in the agreement or mutual understanding of the conspirators. It is sufficient if you find that the conspiracy was formed against a class which included him, and that in the execution of the common purpose it was actually carried into effect against him.

Each member of a conspiracy is responsible personally for the acts of every member thereof, done in furtherance of its illegal purposes, whether he be himself present or not. It follows that the acts and declarations of one of the conspirators while actually engaged in giving effect to the common purpose, may be given

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in evidence against his co-conspirators. Having a common purpose, the acts and declarations of one while carrying that purpose into effect are the acts and declarations of all. But isolated acts of violence by individuals who may have been engaged in the conspiracy cannot be used against the others, unless it appears that they were done in furtherance of the common purpose. All are bound by them if they resulted from the original unlawful agreement between the parties to accomplish by their concerted action the proposed result.

All who were present when the acts of violence, which are relied upon as evidence of the conspiracy in this case, were committed, may not have been conspirators. It is possible that some may have supposed that the whole object of the assemblage was to suppress a riot and preserve the peace. Others, who were in fact the conspirators, may have taken advantage of the occasion to carry their unlawful purposes into effect. Whether this was so or not is for you to determine, and in order that justice may be done and the guilty punished while the innocent escape, the law permits you to so frame your verdict as to accomplish that end. It may be—

1. Guilty as to all upon all the counts.
2. Not guilty as to all upon all the counts.
3. Guilty as to some upon all the counts, and not guilty as to others.
4. Guilty as to some upon one or more of the counts, and not guilty as to the others.

The burden of proof, gentlemen, is upon the government. It is a wise maxim of the law in favor of life and liberty, that every man is presumed to be innocent until he is proven guilty, and this presumption is to continue with your sitting as jurors, until it has been overcome by the testimony beyond a reasonable doubt. But a reasonable doubt is something more than a captious doubt, a mere vague notion that possibly the accused may be innocent. It must be a doubt for which a reason may be assigned. It need not be a reason sufficient to convince another, but it must be such as may properly influence the mind of one who is honestly endeavoring to perform his solemn duty as a juror.

And now in conclusion, gentlemen, we say to you that both

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the government and the defendants are entitled to the independent judgment of each one of you upon the issues presented for your consideration. It is sometimes the case that jurors agree that the vote of a majority, or some other number less than the whole, shall be adopted as the verdict to be returned. Such an arrangement is not in accordance with the requirements of the law. Each of you must find the verdict he agrees to upon his own oath, and no one has the right to shift the responsibility of his final action from his own conscience to that of one or more of his fellows. You may be convinced by his reasons, but you ought not to put yourself in a position to become bound by his simple vote. It is your duty to consult together, to compare your recollections of the testimony, to consider carefully among yourselves the bearings it has upon the facts to be established, and to harmonize your views if possible, but your verdict should be in accordance with your own deliberate judgment.

A single word more. It has been argued before you that this is a political trial and that the prosecution has been instituted and carried on for political purposes alone. Such arguments, gentlemen, should have no influence with you. The case to you and to the court also is political only in the sense that it grows out of an alleged offence against the political rights of a citizen of the United States, secured to him by the National Constitution. That a number of citizens of the United States have been killed, there can be no question. But that is not enough to enable the government of the United States to interfere for their protection. Under the Constitution that duty belongs to the State alone. But when an unlawful combination is made to interfere with any of the rights of National citizenship secured to citizens of the United States by the National Constitution, then an offence is committed against the laws of the United States, and it is not only the right, but the absolute duty of the National government to interfere and afford to its citizens that protection which every good government is bound to give. The case, as alleged in this indictment, is such a case, and you, as citizens, are bound to lift yourselves above the political arena, and render your verdict regardless of popular clamor or partisan excitement. The statute which is to-day invoked for the punishment of an offence against

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a colored man, may to-morrow be used for the protection of a white man. All citizens of the United States, whether they be white or black, are included within its provisions.

You have, gentlemen, a solemn and important duty to perform, and the case is committed to your most careful consideration.

William Stone, United States Attorney, Mr. E. Earle, Assistant United States Attorney, and D. T. Corbin, for the United States.

James Aldrich, Le Roy F. Youmans, Simonton & Barker, D. S. Henderson, C. Richard Miles, and Edward McCrady, Jr., for the defendants.

The jury, after remaining out over thirty hours and being unable to agree, except as to Abner W. Atkinson, whom they found not guilty, were discharged, and a mistrial was entered as to the other defendants.

United States Circuit Court, District of Virginia.

THE UNITED STATES v. THE PETERSBURG JUDGES OF ELECTION. SAME v. THE PETERSBURG REGISTRARS OF ELECTION.

An indictment charged that defendants unlawfully prevented, etc., from voting at a municipal election in Petersburg, certain legally registered voters qualified according to law. Another indictment charged that defendants refused to register certain legally qualified electors of African descent, as voters at the said election. On demurrer it was held, by Bond, Circuit J., that the indictments were sufficient, and that the motive of hostility as to race, etc., might be inferred from the acts charged; HUGHES, J., *contra*, that the indictments were defective for not charging that the acts were done on account of race, color or previous condition of servitude, and that they should be quashed.

Per Hughes, D. J., The 4th section of the Enforcement Act of May 31st 1870, is not founded on the Fifteenth Amendment and is unconstitutional.

Id. The Federal courts have no jurisdiction to protect rights which accrue from the citizenship of a State, but only such as accrue from citizenship of the United States. The right to vote belongs to the former class. It is not a natural or inherent right, but a privilege conferred or with-

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held by the several States in their own discretion. The only guarantee of the United States in this connection is under the Fifteenth Amendment, that no State shall deny or abridge the privilege on account of race, color, or previous condition of servitude. The only case in which the Federal courts can entertain jurisdiction of any question upon this right is where violation of this guarantee is alleged.

Per BOND, Ct. J. The Fourteenth Amendment declares what shall constitute citizenship of the United States as well as of the several States, and gives Congress the power to protect the citizen in all the franchises, rights, and privileges which belong to him either as a citizen of the United States or of a State.

The rights which are given to a citizen by a State, such as the right to vote when possessing certain qualifications, may be modified or taken away by the State, and the United States cannot interfere, but so long as the right remains, the United States has the power to protect him in its enjoyment and exercise.

Rights which do not arise from citizenship but accrue to men as men, such as the security of life and property, remain under the exclusive protection of the States.

The Enforcement Act of May 31st, 1870, providing for the punishment of obstructing voters, is appropriate legislation to enforce the Fourteenth Amendment, and is, therefore, constitutional; and an indictment under it charging the prevention of legally qualified citizens of Virginia from voting, and the refusal to register such citizens as voters, is valid and sufficient, although it does not charge that the acts were done on account of race, color, or previous condition of servitude of the citizens.

THE cases first named above were indictments against the judges who held the municipal election of Petersburg in 1874, respectively at eight precincts in that city. They charged that at a municipal election held there on the 2d May, 1874, these defendants (respectively naming three at each precinct) did unlawfully prevent and obstruct from voting divers persons, to wit, A., B., etc., "citizens of the United States, twenty-one years old, residents of Virginia for more than twelve months, and of Petersburg for more than three months, resident and legally registered voters in said election, and otherwise qualified by law to vote at said election," at the said precincts respectively.

The second cases above named were indictments against the defendants for refusing to register as voters certain citizens, etc.

The defendants demurred to the indictments on the grounds,

1. That there is no averment in any of the counts in the said indictment that the acts of commission and omission charged as

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criminal in said indictment were done or omitted to be done because or on account of "race, color, or previous condition of servitude" of the persons whose rights are averred to have been denied, diminished, impaired, or obstructed by the alleged acts of commission and omission of the defendants.

2. That the said acts and omissions are not averred to have been done under color or in execution of any State law or authority.

3. That the act of Congress, or that part of it on which the said indictment is formed, is unconstitutional and void.

R. T. Daniel, for the demurrers.

L. L. Lewis, District Attorney, for the United States.

BOND, Ct. J.—It is conceded in the argument that had this been at an election for members of Congress or for Presidential electors the demurrer would have been bad ; or that if the pleader had charged that the unlawful obstruction was on account of the race, color, or previous condition of servitude of the electors, no fault could have been found with the indictment. But this was not at a Federal election, nor does the indictment charge that the obstruction was made on account of race, color, or previous condition of servitude.

The question then is whether or not there is constitutional power in Congress to protect a citizen of the United States, *qua* citizen, in the exercise of the elective franchise, either by force of the Fourteenth or Fifteenth Amendment of the Constitution.

Citizenship of the United States prior to the passage of these amendments was, to say the least, but an ill-defined relation. It was by many thought to be derivative, and not direct. A person became a citizen of the United States by force of his citizenship of some one of the States. It was as a citizen of a State that he had a right to sue in Federal courts, and hence a large number of our fellow-citizens during the late civil war were led to think that as they first became citizens of the State, and indirectly through that relation citizens of the United States, their allegiance was first due to the State, and secondarily to the United States.

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It seems to me that the object of the first clause of the first section of the Fourteenth Amendment was to settle this question of allegiance forever, and to make the United States a nation by declaring "that all persons born in the United States are citizens thereof," owing allegiance upon birth, and that consequently the power to protect such persons as owed this allegiance belonged to the United States as fully as the power to protect its citizens for the purposes of its organization inheres in any other nation.

Whether a person's duty to the State or to the United States is paramount, was the question fundamental in the war; and after the expenditure of so much blood and treasure, the people through their legislatures thought it not right to leave the matter doubtful, and so declared in this amendment that not only are all persons born or naturalized in the United States citizens thereof, but are also citizens of the States wherein they reside, thus establishing not only what constituted citizenship of the United States, but, so far as this description of persons is concerned, what constituted citizenship of a State.

Congress is empowered to enforce these two relations created by this amendment by *appropriate legislation*. It has seen fit since the adoption of it to legislate upon the right to vote only.

It is objected to this legislation, which, so far as these cases are concerned, is contained in the 4th section of the act of May 30th, 1870, which provides "that if any person by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, or prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at an election," etc., that the right to vote is not a privilege or immunity of a citizen of the United States as such, and that, therefore, it does not come within the power of Congress to legislate concerning it.

But the Constitution of the State of Virginia declares in its third article that "every male citizen of the United States, twenty-one years of age," who shall have the requisite qualifications, shall have the right to vote; and now the question is, as the right to vote at an election in Virginia is not a right absolute, dependent solely upon citizenship, but a right which the State may modify and control, has Congress the power, where and while the right is given, to protect a citizen in the exercise of it?

It may be fairly concluded that what is meant by citizenship of the State is the same, so far as the power to protect that relation goes, though it may not be coextensive in the privileges given, as is meant by citizenship of the United States.

A State has the undoubted right to control, protect, tax, and summon to arms its citizens to promote the objects for which it exists. And when the Fourteenth Amendment declares that all persons born within the jurisdiction of the United States are citizens of the State in which they reside, every such person becomes liable to these burdens and is entitled to this protection. This will be admitted. When the same amendment declares that such persons are also citizens of the United States, it must mean that they shall occupy the same relation to the General government so far as its purposes are concerned. These purposes we are not left in doubt about, for the Constitution of the United States declares in its preamble that the object of the government is to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, and to secure the blessings of liberty to ourselves and our posterity.

Whatever, therefore, if a State had these objects for its organization, it might require its citizens to do or to refrain from doing to promote them, it seems to me the United States may require. The citizenship which owes its allegiance to each is now created by the same paragraph of the Fourteenth Amendment, and each may summon its citizens to enforce them, or defend them in so doing. In a republican form of government the duty of voting is as responsible a burden as that of bearing arms. The government cannot exist without the power to require both; and if it may protect the citizen in the one obligation, I see no reason, if it be desired to preserve its existence, it may not do so in the other.

If, therefore, a State, by virtue of a person's relation to it as citizen, claims, and has always claimed, the right to protect him in the exercise of a right granted by the United States, surely the United States is not claiming unlawful authority when it undertakes to protect one of its own citizens in a right granted by a State to him as a citizen of the United States. Now the right to vote at a Federal election is bestowed by the Constitu-

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tion of the United States upon such citizens of the States as have the requisite qualifications for electors of the most numerous branch of the State legislature. The State prescribes the qualifications for such electors; but being designated by the State through qualifications prescribed, the United States grants them the right to vote at a Federal election.

Every State by its laws protects its citizens in the exercise of this right, with which, not the State, but the United States clothes them.

If this be within the power of the State by virtue of the citizenship of its citizens, why may not the United States protect its citizens to the fullest extent in a right with which a State clothes them?

But this Fourteenth Amendment goes much farther than this. It declares that all persons born or naturalized in the United States are citizens of the State wherein they reside, and that Congress shall enforce this by appropriate legislation.

That which constitutes citizenship, if it be not the mere privilege of calling oneself citizen, must be the prerogatives, franchises, rights and privileges which the State governments grant to those occupying that relation, in return for the performance of the duties which spring from allegiance and citizenship; and unless this amendment was inane, fruitless and ineffectual, it must mean that Congress by appropriate legislation can protect the citizen of a State in the exercise of all the rights conferred upon him as such, and which distinguish him from those who are aliens or merely residents in the State.

The exercise of this power on the part of the United States can in nowise interfere with the right of the State to prescribe the qualifications of citizens to vote, nor with their privileges and immunities in any other respect. That power remains as heretofore with the State, with the exception that they shall not make race, color, or previous condition of servitude a ground of distinction. It only asserts the power of the United States in return for his allegiance to protect the citizen in the rights which the Federal government grants, and in such as the States from time to time voluntarily bestow upon him, and which they can continue or withdraw at pleasure.

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There is a citizenship of the States and a citizenship of the United States.

What the States may do by reason of this relationship, the United States may do. To give any other construction to the clauses of the Fourteenth Amendment we have been considering, would be to say that everybody born or naturalized in the United States had a right to call himself citizen, and that the amendment drew the relation of citizenship no closer than before its adoption; and that in view of the great contest just over, the people adopted an amendment declaring every one born or naturalized in the United States a citizen, and that Congress might enforce that nominal relation, and the empty claim to be called such, by appropriate legislation.

To overrule this demurrer, it is necessary to claim only that the sovereignty of the United States is equal in its sphere for the protection of the rights and privileges of citizens, to that claimed by the States in the protection of their own.

Nor does this construction of the amendment interfere with the rulings of the Supreme Court in what is known as the *Slaughter-house Cases*.

The right to slaughter animals within the limits of the city of New Orleans was not a right appertaining to citizenship at all. Aliens might do it; but in these cases the right to vote is given to all citizens of the United States as such, and no one else can exercise it. It is an immunity, a defence, a privilege peculiar to that relation, and is not shared in common with all persons whatsoever. It was not personal to a man by reason of his manhood at common law. It is the endowment of the State, peculiar to citizenship.

Before the State was, men had certain rights which belonged to them because they were men. As our Declaration of Independence declares, men are born with certain inalienable rights.

These rights we do not contend the Fourteenth Amendment empowers the United States to protect. It is only such rights, privileges and immunities as the State or the United States, confers upon them because of their citizenship to the United States, that the laws of the United States can insure.

The fear that this construction will draw into the United

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States courts all cases of offences against the person and property of individuals is groundless.

The rights which are inalienable and belong to men as men, and not as citizens, are life, liberty, and the pursuit of happiness. The right to be secure in one's person or property is not peculiar to citizenship. Citizens share that with aliens. Offences against the person as well as those against property are cognizable in the State courts, except where the controversy arises between citizens of different States, a choice of forum is given; but all such privileges as are peculiar to citizenship this Fourteenth Amendment, it seems to me, was adopted to enforce.

And all that the Supreme Court decided in the Slaughter-house Cases, was that the United States by force of the Fourteenth Amendment was not clothed with authority to enforce the rights common to all men but those only peculiar to citizenship.

The right to vote is not the common right of all persons resident in Virginia. It is not the right of all citizens of Virginia *per se*, because a person might be a citizen of Virginia who is not a citizen of the United States, and the Constitution of the State confers the right to vote upon citizens of the United States solely.

The demurrer insists upon it, that as the State has passed no law abridging the right of citizens in any particular, the indictment is bad. This view leaves out of consideration the final clause of the Fourteenth Amendment, which empowers Congress to enforce its provisions by appropriate legislation. The mischief to be prevented by the Fourteenth Amendment was the obstruction of the citizen in the exercise of the rights of citizenship, whatever they from time to time might be. There is no way as yet pointed out by which a State can be punished, and the mischief sought to be prevented might be flagrant in violation of State law, or without any color of authority under it.

The white people in Virginia might, without law or in spite of it, determine that no colored man should vote, and the colored people in South Carolina might, in the same unlawful manner, unite to violently obstruct their white fellow-citizens from exercising the elective franchise. The mischief to be prevented would be flagrant, and yet if this demurrer be good, no

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remedy could be found. Now Congress, in this view of the case, has thought it appropriate legislation to punish the individuals who commit the wrong, whether under color of State authority or without pretending to any authority at all. Who can say that this is not appropriate legislation?

It remedies the existing evil; and a law which accomplishes or tends to accomplish a purpose required by the Constitution to be effected, cannot be said by a judicial tribunal to be inappropriate: Fugitive Slave Law, Act Sept. 18th, 1850.

In answer to the objection that these indictments do not allege that the obstruction had been done on account of race, color, or previous condition of servitude, it is sufficient to say that the statute under which the indictments are drawn uses no such language; and it is most generally sufficient in setting out in pleading a statutory offence, to use the words of the statute creating it.

But if it be contended that the only power Congress had to pass the statute was that granted by the Fifteenth Amendment, which prevents discrimination among voters on account of race, color, or previous condition, etc., and authorizes appropriate legislation to prevent such discrimination, there is answer to it in this, that it is impossible to prove, though the fact may be so, if a body of colored men in South Carolina assault and beat fifty white people at the polls and prevent their voting, and at the same time knock two colored people down, that this was done on account of race or color. Congress thought to cut the thing up by the roots, and enacted what is really and practically the only appropriate legislation, as any person who has seen the efforts to enforce this section must know, that no person shall disturb another at an election to prevent his exercise of the franchise; and as the greater includes the less, if he can do so from no motive he cannot do it because of race, color, or previous condition, etc.

And from these considerations we have drawn the following conclusions:

1st. That by the Fourteenth Amendment to the Constitution the people have provided a citizenship to the United States, direct, positive and paramount, springing from birth within its jurisdiction, or by statutory naturalization.

2d. That what the States have claimed to do by virtue of their

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sovereign power over their citizens, the United States may do over its citizens by virtue of its sovereign power and the direct relationship thus established.

3d. That while the Fourteenth Amendment, in furtherance of this view, declares that no State shall make or enforce any law contrary to this provision, it likewise declares that Congress shall enforce the amendment by appropriate legislation. And that as Congress cannot punish a State *qua* State, it is appropriate legislation within the meaning of the statute to attain its end, *i. e.*, the protection of the citizen in his right to vote by punishing the individuals who obstruct him in its exercise.

And that even under the Fifteenth Amendment, where experience has shown the obstruction of voters on account of race and color cannot be, in the judgment of Congress, otherwise prevented, it is appropriate legislation to provide by statute that no such obstruction shall take place at all.

And that this construction of the Fourteenth and Fifteenth Amendments does not affect the rights of the States to define the rights of citizenship, nor does it draw into the jurisdiction of the United States courts the question of the invasion of the rights of persons or property, as such. It concerns only the rights which distinguish persons as citizens, and which they hold in that character.

HUGHES, D. J.—If the election described, instead of being for municipal officers, had been for a member of Congress or presidential electors of the United States, these indictments, for reasons which need not here be set forth, would have been valid to give jurisdiction to this court, and would have been founded on those sections of the Enforcement Acts of Congress which expressly relate to national elections.

On the other hand, if the indictments had charged that the persons prevented from voting at this State election were persons of Saxon, Celtic, Mongol, African, or other descent, and that the defendants prevented them from voting on account of race, then, being founded upon those sections of the Enforcement Acts which were designed to enforce the Fifteenth Amendment of the National Constitution, they would have given jurisdiction to

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this court : because the Fifteenth Amendment expressly declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The offence charged, however, is clearly not within either of these categories. If it had been, the jurisdiction of this court to try it would have been undeniable.

The indictments are really founded upon the 4th section of the Enforcement Act of May 31st, 1870, which declares that "if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, . . . any citizen from doing any act required to be done to qualify him to vote, or from voting at any election (by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision), such person shall for every such offence . . . be guilty of a misdemeanor, and shall, on conviction thereof, be fined, etc., or imprisoned, etc., or both at the discretion of the court."

This section is clearly not founded upon the Fifteenth Amendment, and, if constitutional at all, is so only by virtue of the clauses of the Fourteenth Amendment, which declare as follows: "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*, . . . nor deny to any person the equal protection of the laws. Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

If this language of the Fourteenth Amendment, giving to Congress power to legislate for preventing the abridgment of the rights of citizens of the United States, were not qualified by another provision of that amendment, and were allowed its widest signification, then it is broad enough to cover the 4th section of the Enforcement Act of May, 1870, which I have quoted, in the broadest signification of that section's language; and the national courts would have jurisdiction to try *any* offence abridging *any* right of *any* citizen of the United States on *any*

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account ; and the indictments at bar would give jurisdiction to this court over the offences charged.

But is this language to be so interpreted ? Is it not rather to be limited by construction ? If the latter, then the language is to be construed according to rules of statutory interpretation, which are as much a part of the statutory law as the statutes themselves. Although, as will appear in the sequel, it is unnecessary for me to do so with reference to the eight indictments under immediate consideration, I shall first treat this clause of the Fourteenth Amendment as if it were not qualified by any other clause in that amendment, or by the Fifteenth Amendment.

It is a settled principle of construction that all instruments are to be interpreted according to their real intention and object ; and when statutes employ general terms, those terms are to be limited in giving effect to the statutes, according to the real meaning of their authors, rather than according to their literal meaning, so as to correct the evil and advance the remedy contemplated by them. The illustration of this principle, which is most familiar to the legal profession, is that given by Blackstone, Book 1, p. 59. A law of Edward III forbade all ecclesiastical persons to purchase *provisions* at Rome. If the term *provisions* had been given its widest meaning, it would have forbidden any of the English clergy who might happen to be at Rome from buying *food* ; but the statute was construed with reference to its intention, which was to prohibit the purchasing of nominations by the Pope to ecclesiastical benefices in England, which at that day were called *provisions*.

It is a general principle that the language of statutes is, if possible, not to be so interpreted as to produce absurdity, or oppression, or evils greater than those designed to be remedied by them. Indeed, the very function and province of a court is to construe and apply the law according to its true meaning only, and for securing its real objects alone.

It is, therefore, perfectly competent for the National courts to discriminate between "the privileges and immunities of citizens of the United States," alluded to by the Fourteenth Amendment, and to limit the meaning of the acts of Congress passed to protect them (the fourth section of the first Enforcement Act among

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others), so as to make them conform in practice to the spirit of the Constitution of the United States, which regards the National government as one of limited, express powers, and the governments of the States as of general powers, not expressly enumerated. The authority of the courts to *enlarge* the powers of the National government by construction has always encountered more or less disfavor. Their authority to *limit* those powers by construction has never been regarded with jealousy.

The only difficulty in thus discriminating lies in ascertaining the principle on which to proceed, and the line of distinction to be drawn in regard to the privileges of the citizens of the United States intended to be protected. I flatter myself, however, that this difficulty can easily be surmounted in considering the questions raised upon the indictments before us.

The Supreme Court of the United States, in its decision in the *Slaughter-house Cases*, 16 Wallace, 36, has taken a part of the responsibility of this task off our hands. Those were cases in which the subject of complaint was an act of the legislature of Louisiana. That act created a joint stock company; empowered it to hold certain estate near the city of New Orleans; required that all animals which should be slaughtered within a large territory surrounding that city should be slaughtered upon the premises of this company; and gave it, in these and other respects, exclusive rights in abridgment of the like rights of other citizens, and especially of persons following the trade of butchering in the area described.

The United States Supreme Court held that the National courts had no jurisdiction to protect citizens of Louisiana, though they were citizens of the United States, in such privileges as were abridged in the act of incorporation complained of, passed by the legislature, and approved by the Supreme Court of the State. In its decision in these cases, pronounced by Justice Miller, the Supreme Court say, 16 Wallace, 77, 78:

“ Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal govern-

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ment? And where it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow if the proposition of the plaintiffs in error be sound. For, not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative powers by the States, in their most ordinary and usual functions, as in its judgment it may think proper, on all such subjects.

"And still further, such a construction, followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed those amendments, nor by the legislatures of the States which ratified them."

That august court accordingly decided that it had no jurisdiction to protect the privileges which were abridged by the act of incorporation complained of, the privileges abridged being those which belong to citizens of the State as such, and distinguished from those which attached to them as citizens of the United States.

Its decision authorizes us to construe the clauses of the Fourteenth Amendment in question, and the acts of Congress passed to enforce them, according to their direct historical object, rather than their mere literal meaning; and, more particularly, so to construe them as to discriminate between those rights of the citizen which he has as a citizen of the State and those which belong to him as a citizen of the United States.

In *Corfield v. Coryell*, 4 Wash. C. C. Reports, 371, Justice Washington defined the privileges and immunities which belong to citizens of the States as such to be those which he called "fundamental;" such as "belong of right to citizens of all governments, and always belonged to citizens of the several States of this Union from the time of their independence." They embrace those rights which belong to a man as a member of society, together with those which the Constitution and laws of his State confer upon its citizens.

On the other hand, the rights which we have as citizens of the United States are such as are implied in the language of Judge Taney, when he declared that "we are citizens of the United States for all the great purposes for which the Federal government was established." For instance, a man as a citizen of Virginia may carry on a business here by paying a certain tax: in virtue of which fact a citizen of Maryland, as a citizen of the United States, has a right to carry on the like business in Virginia by the payment of no greater tax. So, under the Constitution of the State, a man born in Virginia is a citizen here after a certain age; by virtue of which fact he may become, under the Constitution of the United States, a citizen of New York by a change of residence to that State. This parallel between the rights held by citizens, respectively, in their two characters, might be run out through many examples; but the distinction is too plain to need further illustration. For other decisions on the subject, see 9 Wheat., 203; 11 Pet., 102; 5 Wallace, 471; 8 Id., 180; 9 Id., 41; and 12 Id., 430.

Adopting this broad distinction, and availing of the authority given by the Supreme Court in its decision in the *Slaughter-house Cases*, the national courts are justified in refusing to take cognizance of offences committed in violation of those rights which belong to a person as the citizen of a State, not created or conferred, but only guaranteed, by the National Constitution; and in confining their jurisdiction to those rights which belong to persons peculiarly in their character as citizens of the United States.

This much being settled, and inasmuch as the fourth section of the Enforcement Act of May, 1870, concerns only the citizen's right of voting, it is only necessary to inquire how the right of

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voting attaches to the citizen; whether in his character as a citizen of the State, or in that of a citizen of the United States.

Before the adoption of the Fourteenth Amendment, a man was a citizen of the United States only derivatively, by virtue of his being a citizen of a State. Such was the principle of the decision of the Supreme Court of the United States in the case of *Dred Scott v. Sanford*, 19 Howard, 393, in which that court expressly decided that as a man of African descent was not the citizen of any State, therefore he could not be a citizen of the United States.

By the adoption of the Fourteenth Amendment, the new *status* of citizenship of the United States, independently of that of citizenship of the State, was first established; but it does not follow that the incorporation of this new provision into our national polity has abolished or obliterated the line of distinction which the National courts had claimed the power to draw between the rights of a person as citizen of a State and those which he had as citizen of the United States. There is not yet any general act of Congress clothing the citizen of the United States *proprio vigore* with all the rights of the citizen of the State where he resides, and giving the National courts express jurisdiction to protect those rights.

Certainly there can be no law of Congress found which directly purports to constitute any citizen of the United States a voter in the State in which he resides. Indeed, such a law would seem to be unconstitutional; for the Fourteenth Amendment itself contains a clause which leaves to the States the power, always before possessed by and conceded to them, of prohibiting citizens of the United States from voting, and of declaring who shall be voters, even in National elections. That amendment, in the second paragraph, provides that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is *denied to any of the male inhabitants of such State*, being twenty-one years old, and *citizens of the United States*, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens bears to the whole number of male citizens

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twenty-one years of age in such State." Thus the right to vote, even of citizens of the United States, is left even by the Fourteenth Amendment itself, to be regulated and defined by the States, which had always held that power. The State of Virginia has accordingly exercised this prerogative, pursuant to her own uncontrolled views of justice and propriety, in the first clause of the third article of her State Constitution, which is in these words: "Every male citizen of the United States twenty-one years old who shall have been a resident of this State twelve months, and of the county, city, or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote upon all questions submitted to the people at such election;" following this general provision with the usual exceptions of persons committing crime, etc.

And here I will remark that the right to vote would seem to be not *fundamental*; not a natural right. The power to declare who shall be voters, who shall be constituents of the political sovereignty of a State, has been claimed by and conceded to each State from the beginning of our independence; and is expressly conceded by the clause of the Fourteenth Amendment which I last quoted. The right to vote would seem to be not an inherent *right*, but a conferred *privilege*; a privilege not derived from the United States, but from the State alone; a privilege belonging to the man as a citizen of the State, and not to him in his character as citizen of the United States. The noble liberality of Virginia in making every citizen of the United States resident within her borders a voter in every election, does not in any degree change the fact that he derives this right *from herself*. Nor does the obligation of the United States to guarantee to the States a republican form of government change the *fact* now existing, and which has existed from the founding of the Union, that to the States is left the power of defining and regulating the right of suffrage, a power without which a State could scarcely be considered as any longer retaining its autonomy.

It being, therefore, incontrovertible that the right to vote in a State election belongs to a man as the citizen of his State, it remains to ask what right connected with voting belongs to him as a citizen of the United States. Under the Fifteenth Amend-

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ment his right as a national citizen is—*not to be prevented from voting "on account of race, color, or previous condition of servitude;"* which is a right not involved in the indictments at bar. Has he any similar right in his national character under the Fourteenth Amendment? Whatever right the national citizen, as such, may have, under the general terms of the Fourteenth Amendment, *not to be abridged in his privileges or immunities*, so far as other privileges are concerned, yet that amendment gives him no such right as to the privilege of voting, because it expressly leaves to the States the power of regulating the right of suffrage in both State and National elections. It is therefore plain that not only is the right to vote derived from the State, and not only does it belong to the category of rights which it is peculiarly within the province of the State tribunals to protect, but it is excepted by the Fourteenth Amendment from those general privileges and immunities of citizens of the United States which the States are forbidden to abridge. It is indeed a right which the States are expressly allowed to abridge in every other respect than on account of race, color, and previous servitude.

If the Constitution gives this permission to the States, then no act of Congress forbidding the abridgment of this right on other account than of race, color, etc., is constitutional, and no indictment founded upon such a law is valid to give jurisdiction of the offence charged to the National courts.

It is contended that from whatever source a right comes to a citizen of the United States, yet, once attaching to him, it is competent for Congress and the United States courts to protect him in it. This argument would confer the power and duty of protecting the citizen of the United States from any of the ordinary offences at common law, such as murder, false imprisonment, and the like. This cannot be a sound proposition. There is an obvious distinction to be made on this subject.

Although still unnecessary to my argument as to the eight indictments mentioned, I will advert to the distinction which should be drawn between rights proper and those improper for the jurisdiction of the National courts. It is that so well stated by Mr. Justice Bradley in his opinion in the case of the *United States v. Cruikshank et als.*, reported in 13 American Law Register 630,

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where the learned justice distinguishes between those provisions of the National Constitution which guarantee fundamental rights, the duty of protecting which properly belongs to the States, and those provisions which either create rights or enjoin affirmative legislation upon Congress for their protection.

I cannot but express a cordial and full concurrence in the following remarks of Mr. Justice Bradley on that subject. He says:

"With regard to those acknowledged rights and privileges of the citizen which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular State of which he is a citizen to protect and enforce them, and to do nought to deprive him of their full enjoyment.

"When any of these rights and privileges are secured by the Constitution of the United States only by a declaration that the State or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the State, or the United States, as the case may be.

"The fulfilment by the United States of this guaranty is the only duty with which that government is charged.

"The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the State government as a part of its residuary sovereignty."

If this distinction be correct, then, as the right of voting is not conferred by the National Constitution, nor even guaranteed by that instrument, except in a qualified and negative way by the Fifteenth Amendment, it is not one of those rights over which, when proposed to be exercised in a State election, Congress or the National courts have jurisdiction.

Thus are we brought by legitimate argument, founded upon the decision in the *Slaughter-house Cases*, and the very able one in the *Cruikshank Case*, to a conclusion against the validity of the eight indictments pending against the judges of election of Petersburg.

But there is a much more direct method of reaching the same conclusion, which avoids a resort to the power of construction, and which renders useless the distinction drawn by the National

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courts in the cases alluded to between the rights belonging to a person respectively in his two characters of citizen of the State and citizen of the United States, and between the rights created or conferred, and those merely guaranteed by the National Constitution. It is this :

Admit for argument's sake, that the Fourteenth Amendment, in its first paragraph, was intended to prohibit the abridgment of any privilege of the citizen by the State, or by its citizens, on any account whatever: yet the second paragraph of the same amendment, which leaves to the States the power always held by them to prescribe the qualifications for suffrage at their pleasure in National and State elections, expressly excepts the right of voting from those general privileges; and the most that can be insisted upon is that the Fourteenth Amendment protects the citizen of the United States in all privileges except the right of voting, and leaves this right to be regulated *ad libitum* by the States. It was this latter fact which created the necessity for the Fifteenth Amendment, and that amendment would mean nothing, and would have been wholly unnecessary if before its adoption the States had not had uncontrolled power over the right of suffrage. Its sole object was to limit the unrestrained power of the State over this right which had been conceded by the Fourteenth Amendment; but it undertook to limit the power only in one respect. It declared in substance that notwithstanding the States possessed uncontrolled power over this right they should be restricted in exercising their power at least this far, to wit: They should not deny or abridge the right of the citizen to vote "on account of race, color, or previous condition of servitude."

I am, therefore, of opinion that any law of Congress is unconstitutional which makes the preventing of a voter from voting in a State election penal on any other account than of race, color, or previous condition of servitude; and that any indictment charging such an offence, though founded upon such a law or section of a law of Congress, is invalid to give jurisdiction of such an offence to this court. I think, consequently, that the demurrers of the defendants to the eight indictments against the

Petersburg judges of election are good, and that the indictments should be quashed.

II. The three indictments pending against certain registrars of election in Petersburg differ in two respects as to the questions which I have been considering, from those pending against the judges of election.

1. They allege that the persons who were prevented from registering were of African descent, but omit to charge that they were prevented from registering "on account of race, color, or previous condition of servitude." These are not indictments, therefore, founded upon the Fifteenth Amendment or any act of Congress passed for enforcing it. We are not at liberty to infer from the mere circumstances that a man was of any particular race, and prevented from exercising a right, that he was so prevented on account of his race. That fact must be charged before it can be proved, and the failure to charge it is, I think, fatal to these indictments, so far as the Fifteenth Amendment and the statutes enforcing it are concerned.

2. These three indictments each charge in substance that the defendant "did refuse and knowingly omit to give to all citizens of the United States in his ward the same and equal opportunity, without distinction of race, color, or previous condition of servitude, to register, etc.; but to the contrary thereof, refused and knowingly omitted to give A., B., C., D., and E. the opportunity to register which he gave to others, the said A., B., C., D., and E. being qualified, etc., and citizens of the United States of "African race and descent." By not charging that the refusal was on account of the race, etc., of the injured persons, these indictments, for the reasons I have stated, do not come under the Fifteenth Amendment. If they are valid at all, to give jurisdiction to this court it must be under the Fourteenth Amendment and the 4th section of the Act of May, 1870. But, for reasons already abundantly stated, registration is a right conferred by the State. Each of the three indictments under immediate consideration expressly recites that the right is conferred by the laws of Virginia, and that the duties of the registrar were duties imposed by State laws. Nor do they charge that in consequence of the failure of the injured persons named to be admitted to registra-

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tion they lost their right to vote either at a State election or an election held for officers of the United States. The denial merely of registration is an offence against the State, if it be on any other account than of race, color, etc., If the indictments had charged that the denial had been on account of race, etc., the offence would have been cognizable here ; or if, after charging the denial, the indictments had gone on to charge that in consequence thereof the citizen of the United States was prevented from voting at an election held for a member of Congress, or electors of a President of the United States, I am inclined to think that the offence would have been cognizable here. But a charge merely that a citizen of the United States was denied registration, without other allegation to make it appear that some right was abridged which belonged to the man as a citizen of the United States, is not sufficient to give cognizance of the offence to this court.

I, am, therefore, of opinion that the demurrers to these indictments against the Petersburg registrars ought to be sustained, and that the latter ought to be quashed.

The judges being divided in opinion, the case was certified to the Supreme Court of the United States.

*United States Circuit Court, Eastern District of Virginia, at
Alexandria, July Term, 1874.*

UNITED STATES v. E. R. TAYLOR.

Section 279 of the Revised Postal Laws of 1872 (v. 17, p. 298, ch. 335, section 114 of the acts of Congress for that year ; now section 5467 of the Revised Statutes of the United States) created two distinct offences, to wit, first, the embezzling, etc., of a letter carried in the United States mail, and second, the stealing of its contents ; and, therefore, an indictment charging merely the embezzlement is sufficient to sustain a verdict of guilty, on motion in arrest of judgment, and to warrant judgment and sentence.

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This was an indictment against the defendant, as a postal-car clerk, engaged in the postal service of the United States, on the mail route from Washington City to Lynchburg, Virginia, on the Orange, Alexandria, and Manassas Railroad, for embezzling a letter intrusted to him which was intended to be conveyed by mail and to be delivered at the town of Charlottesville, the letter having been addressed to John T. & Henry McColly at the University of Virginia, and having contained fourteen coupons, each for \$35, aggregating to \$490 in value; the letter having been deposited at the post-office at Huntsville, Alabama, and having never been delivered at Charlottesville, Virginia.

The United States Attorney, L. L. Lewis, for the prosecution.

L. H. Chandler, Alfred Morton, and B. W. Hoxsey, for the defence.

The jury brought in a verdict of guilty, and most of them accompanied the verdict with a paper recommending the prisoner to the clemency of the court.

The counsel of the prisoner, through Mr. Alfred Morton, moved for an arrest of judgment, on the following grounds:

Section 279 of the act of Congress, "to revise, consolidate, and amend the statutes relating to the Post-office Department," approved June 8th, 1872, is so worded as to seem to make one offence of the several acts, which it describes, and, in its latter clause, to employ a different phraseology from that which was used in section 21 of the statute of March 3d, 1825, of which it is a revisal. The section as it now stands declares that any person employed in the postal service, who shall secrete, embezzle, or destroy any letter coming into his possession, which was intended to be conveyed by the mail, containing any agreement for the payment of money; any such person who shall steal or take such contents out of any letter coming into his possession in the regular course of his official duties, provided the letter shall not have been delivered to the person to whom addressed, every such person shall, on conviction thereof, for every such offence, be imprisoned at hard labor not less than one nor more

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than five years. Upon this section, thus worded and punctuated, the question arises whether the embezzlement of the letter is itself a complete offence under the section, subjecting the embezzler to the penalty denounced; or, whether the embezzlement of the letter and the stealing of its contents are not two acts, both of which are necessary to constitute the offence created by this section of the statute.

In the original law the phrase in the latter clause of the section, "or if any such person," is used; whereas in the new law this disjunctive form of expression is abandoned, and the explanatory form, "any such person" is substituted. If the disjunctive form of the old law had been preserved in the new, then a different person might be punished for stealing the contents from the one who had embezzled the letter itself; and two distinct offences would have been created by the section.

But the present language of the section is such as to seem, in the phrases "any person who shall secrete, embezzle, or destroy," and "any such person who shall," and "every such person shall," to refer throughout to the same person; and to require that this same person, in order to conviction, shall have embezzled the letter and stolen its contents also.

If such be the proper construction of this section, if it really intends that the offence provided for shall consist of the embezzling of the letter and the stealing of its contents, then, of course, the indictment, in order to be good, must, in each count, charge the embezzling, and also charge the stealing.

In the case of Taylor the indictment does not contain a charge of the stealing of the contents of the letter. It charges only the embezzlement of the letter. Nor is there a second count charging the stealing.

If these two acts be necessary to constitute the offence created by section 279, then there can be no sentence pronounced upon a verdict of guilty, found on an indictment charging only the embezzlement.

The judge said, that as there had been no decision upon the section in its new form, and it was important that it should be decided deliberately and correctly, in order that district attorneys should know with certainty upon what construction of the section to

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draw their indictments in future cases, he would entertain the motion in arrest of judgment until the adjourned term of the court, to be held at Richmond, on the 8th of September next, and would put the defendant under bail to appear there on that day to answer the judgment of the court, which was accordingly done.

At Richmond, 8th September, 1874, the judge rendered his decision in the case as follows :

HUGHES, J.—Section 279 of the Revised Postal Laws, divested of the words which are inapplicable to the offence charged in the indictment in this case, is as follows :

“ Any person employed in any department of the postal service of the United States who shall secrete, embezzle, or destroy any letter intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried by any person employed in any department of the mail service, and which shall contain any banknote, bond, draft, promissory note, or agreement for the payment of money ; any such person who shall steal or take any of the things aforesaid out of any letter which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, every such person shall on conviction thereof, for every such offence, be imprisoned at hard labor not less than one nor more than five years.”

This section contemplates and recites two distinct acts, that of embezzling the letter, and that of stealing its contents, and the question arising upon it is, whether it intends to make each of these acts punishable by the imprisonment it imposes, or, whether it intends that both acts shall be necessary to constitute one offence.

If the two acts are necessary to constitute the offence punishable under the section, then this indictment is defective because it charges only the embezzling of the letter, and contains no charge of the stealing of the contents, and the verdict of guilty which has been found on the indictment, and which therefore finds only the embezzling, is not sufficient to warrant a judgment and sentence for embezzling *and* stealing.

It is hardly necessary to premise that (with a very few excep-

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tions) there are no offences against the United States cognizable by the national courts, except such as are made so by express law of Congress, and that any such offence, in order to be punishable, must be brought by the indictment strictly within the terms of the express law, and that no law of Congress can be held to embrace an offence against the United States merely from the fact, that, otherwise, the offence would go unpunished. The offence must be expressly created by law, and must be distinctly charged in the indictment.

At the trial of this cause I was strongly of opinion that section 279 of the amended law of 1872, was at least ambiguous, and that the motion in arrest of judgment might be sustained on that ground alone, for there is no more obvious principle of natural justice than that the laws creating offences, *mala prohibita*, ought to be plain, clear and unequivocal. As this case will constitute an important precedent, and it was desirable that it should be decided upon mature deliberation, I adjourned the motion and the term of the court over until this occasion, partly in the hope that the circuit judge might be present, and aid in settling the question arising upon the law for this circuit.

The question, as before stated, raised by the motion in arrest of judgment, is, whether section 279 makes the act of embezzling the letter, and the act of stealing its contents, each punishable by imprisonment for from one to five years; or, whether, under the peculiar language of the section, both acts are necessary to constitute the offence made punishable. It was contended in argument, that the whole of the first part of the section, down to the phrase "any such person," is descriptive of the person chargeable with the offence, and that the words *any such person* refer to the person who has secreted, embezzled or destroyed the letter described, and not merely to a person "employed in any department of the postal service." If this be so, then every indictment framed upon this section must recite the embezzling, and also charge the stealing, and the verdict must find both facts, in order to warrant a judgment and sentence of imprisonment.

This construction, however, cannot be adopted by the court. It is plain from the whole context, that this part of the section retains, since the amendment, the meaning which it had before,

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and which it has been construed to have, ever since it was adopted into our penal code from that of England, in 1825. The object of this first part of the section is, not to describe a person, but to define an offence, that of secreting, embezzling, or destroying a letter intended to be conveyed by mail, and coming into the possession of the postal employé in the regular course of his official duties. The word "such" in the phrase "any *such* person," has always been held, and must still be held, to refer only to an employé in the postal service; and has never been, and cannot now be, held, to refer comprehensively to an employé who has embezzled a letter intrusted to him in the course of his official duty.

A proper means of testing the true meaning of the whole section, is by inquiring whether the section makes it necessary that the same person who embezzles the letter shall also steal its contents, and that the letter be the same as the one whose contents were stolen, in order to complete the offence made punishable.

The person who embezzles and the one who steals, must in either case, be an employé of the department of the postal service. The letter embezzled and the letter whose contents are stolen, must each be intended to be conveyed by mail, and must not have been delivered to the person to whom addressed. So far, the person and the letter may be the same in each case. But the section evidently contemplates that the employé who embezzles may be other than the employé who steals, and that the letters may be different, in providing that the embezzled letter must come into the possession of the employé in the course of his official duties; while it provides that the letter whose contents are stolen, may come into the employé's possession, either "in the regular course of his official duties," or "in any *other* manner whatever."

That the employé who embezzles may be a different person from the one who steals, and that the letters may be different, is also implied in the whole tenor of the two clauses of the section. This being so, the section in first reciting that any employé who embezzles, and then reciting that any employé who steals, without coupling the two clauses by the conjunctive word "*and*;" and in finally following up the two distinct recitals with the declaration that "*every* such person," "for *every* such offence"

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shall be imprisoned, etc., seems to put to rest all doubt of its intention and to create two distinct offences, each punishable by imprisonment.

This reasoning is rendered conclusive by the reflection, that if the section in its amended form had been intended to make the embezzling and the stealing together, one statutory offence, it would have adopted the direct method of doing so, by uniting the two acts in the same clause, and declaring that any employé in the postal service who shall secrete, embezzle, or destroy a letter containing a thing of value, and steal its contents, shall be punished, and would not have first elaborately defined the offence of embezzling, and then, in a different clause, as elaborately defined that of stealing.

For these reasons, and others which might be adduced, I am bound to conclude that Congress, in revising the postal laws in 1872, did not intend to destroy the original meaning of the section of which the present section 279 is a revisal, which made two offences of embezzling a letter, and stealing its contents, each punishable by imprisonment.

As the indictment, therefore, sufficiently charges the embezzlement, and a verdict of guilty has been found upon it, and as the statute makes the embezzling alone punishable by imprisonment, the motion in arrest of judgment must be overruled, which is accordingly done.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, April 13th, 1875.*

UNITED STATES v. G. A. SHEPHERD.

Under the Revision of 1874, that clause of (section 59, ch. 106, of the act of Congress of 8d June, 1864), relating to the national banks, which makes the offence it creates a *felony*, is repealed, and an indictment charging such an offence need not charge that it was feloniously committed.

There are no crimes against the United States which are felonies by virtue of the common law, except such as may be committed on the high seas,

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or in the places in the States which are under the exclusive jurisdiction of the United States.

Except offences committed on the high seas or in such places, there are no felonies against the United States, cognizable by courts of the United States, except those which are expressly made such by act of Congress.

Trials for misdemeanors may be had after service of summons upon the accused, without the actual presence of the accused in court, especially if he is represented by counsel, certainly in the State of Virginia.

The verdict of guilty upon an indictment for misdemeanor may be rendered by a jury in the absence of the accused, if his counsel be present; and when so rendered, judgment will not be arrested.

The indictment was for attempting to pass a falsely altered note of the national currency, knowing it to be falsely altered, in violation of the 5145th section of the Revised Statutes, which declares, as to this offence, that "every person who attempts to pass any falsely altered circulating note purporting to have been issued by any banking association authorized under the laws of the United States, knowing the same to be falsely altered, shall be imprisoned at hard labor not less than five years nor more than fifteen years, and fined not more than one thousand dollars."

The act of Congress passed in 1864, from which this section is taken, contained a clause declaring that such a person shall be deemed and adjudged guilty of felony and shall be imprisoned, etc., but this clause is omitted in the revision of 1874.

The note was falsely raised from a one dollar to a ten dollar note. The case was tried on the 8th of April, and given to the jury, and on the 9th, the jury found a verdict of guilty, but brought in their verdict at a late hour of the day, after the prisoner had been taken to jail; and he was present only by counsel.

Before finding the verdict, the jury had been in deliberation for thirty hours, and a few hours before rendering their verdict, had come into court and asked instructions on parts of the case which are adverted to in the opinion of the judge.

Immediately on the rendering of the verdict the prisoner's counsel moved in arrest of judgment, and for a new trial. The grounds of these motions were:

1st. That this was by law a felony and the indictment did not

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charge that the prisoner "*feloniously*" attempted to pass the falsely altered note, and should be quashed.

2d. That whether a felony, or a misdemeanor, punishable by an imprisonment, which the court might fix for fifteen years, the prisoner ought to have been allowed the privilege of being present when the verdict was rendered ; and that, having been held in jail at the time by the United States, the verdict ought to be set aside.

3d. That the verdict ought also to be set aside because it was contrary to the law and the evidence.

HUGHES, J.—The court overrules the first objection. The repealing chapters at the end of the Revised Statutes of the United States of 1874, repeals all former acts of Congress, "any portion of which is embraced in the revision." The revision therefore repeals that part of sec. 59, of ch. 106 of the act of 1864, relating to the National Banks, which makes the offence named a "felony." Not being a felony, of course the offence should not have been charged as having been "*feloniously*" committed.

Except those committed on the high seas and within the forts, arsenals, and other places exclusively within the jurisdiction of the United States, and except high treason, there are no common law offences against the United States ; and all crimes are statutory.

There are therefore no felonies against the United States except those expressly declared to be such by act of Congress. It has not been the policy of Congress to multiply felonies ; comparatively few offences are declared to be felonies. As a general rule, offences against the United States are misdemeanors punishable by imprisonment, by fine and imprisonment, by fine or imprisonment, or by fine alone. If punishable by fine alone, the offenders may be proceeded against by indictment for the fine or by action of debt for the penalty.

Therefore a very large number of offences against the United States may be tried in the absence of the accused, if his counsel be present.

The court also overrules the second objection. The cases cited by prisoner's counsel only go to the extent of ruling that verdicts in trials for *felony* must be rendered in the presence of the

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prisoner. They do not invalidate verdicts rendered in the absence of the accused in cases of misdemeanor. This exception in respect to misdemeanors has not been made merely because in misdemeanor trials the accused is usually on bail, and if absent, is voluntarily so. The cases make no distinction in such trials between those in which the accused is on bail, and those in which he is not. The code of Virginia (ch. 201, sec. 25, p. 1243), allows the trial of misdemeanor to proceed, provided a summons has been served, whether a *capias* has been returned, executed, or not executed, and whether the accused be present in person or not. In such matters the practice in the courts of the State, furnishes the rule of practice in this court.

The old formula of the common law practice, requiring the clerk when the jury appeared with their verdict, to say: "Gentlemen of the jury, look upon the prisoner and hearken unto your verdict," originated at a time when the penal code of England was a very bloody one, and denounced capital punishment for the most trivial offences; when the pleadings even in criminal prosecutions were written in a foreign language, and when prisoners were not allowed the advice and assistance of counsel. The barbarities of criminal *justice* were then so gross, that great and humane judges availed themselves of the most technical irregularities in the pleadings and proceedings as an excuse for discharging prisoners standing dumb and helpless before them, and threatened with the most awful punishment for the most venial offences.

But the penal code has in modern times been stripped of its barbarities; penalties are apportioned in degree to the crimes which they are intended to prevent; prisoners enjoy the assistance of counsel, and are provided with opportunity and means of full and complete defence. All proceedings are conducted in the vernacular of the country and of the accused, unless he be a foreigner, in which case they are humanely interpreted to him. The old technicalities of the criminal practice have been gradually discarded, as the necessity for them decreased, and finally ceased; and now, the rules of the criminal practice are as little arbitrary and technical, and as reasonable and just as they are in civil proceedings.

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The prisoner at bar was ably defended at every stage of the trial, and though he was not personally present when the verdict was rendered, both of his counsel were. They did not ask that he should be brought in; they moved *instantly* for an arrest of judgment and a new trial, and did all that the prisoner could have done or demanded if he had been present in person. The second objection is therefore overruled.

3d. The prisoner's counsel also make several objections to the verdict, as contrary to the law and evidence of the case. (1st.) One is, that it was not proved beyond doubt that the accused *knew* that the note was falsely altered when he attempted to pass it. (2d.) Another is, that a confession made to the arresting officers at a considerable interval of time after the arrest, was given in evidence, so as to have an effect upon the views of the jury, in spite of the instructions of the court, that they should not be regarded. (3d.) Still another objection is, that the extraordinary length of time during which the jury were in deliberation, indicated that they were doubtful of the guilt of the prisoner.

(1.) It is true that there was not much positive proof that the prisoner *knew* that the note was falsely altered. This knowledge on his part was inferred in part from circumstances; but these were such as could leave no doubt on the mind of the jury of the guilty knowledge. The alteration of the note, though skillfully enough done to escape notice in the hurry of business, was so perceptible when once suspected, that the prisoner could not but have known it when he attempted to pass it. The appearance of the note was of itself conclusive of the fact of guilty knowledge, in any attempt to pass it in broad daylight, after it had been examined by the holder.

(2.) The court positively instructed the jury that confessions elicited by an officer from a prisoner while in duress and alarm, and without warning as to the use that would be made of them, were not evidence. I cannot infer in the present case, that the jury disregarded this instruction. A similar admission to that afterwards made to the officer was made by the prisoner when arrested in the presence of the person to whom he offered the note, and *was* evidence as a part of the *res gestæ*.

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3d. My own understanding is that the jury were held a long time in doubt by the misapprehension that the *attempt* to pass the note was not an offence, and that the prisoner could only be convicted in the event that he actually passed it. After they were instructed by the court that the law made the *attempt* to pass, an offence, as well as the passing, and that the indictment charged the attempt, the jury were but a short time in deliberation.

I do not, therefore, think the case is one in which it would be proper to set aside the verdict and to award a new trial.

It is, indeed, emphatically a case in which neither jury nor court can give relief. It is the case of a young man of good character, reputable connections, industriously engaged in making an honest livelihood, who is cheated on a railroad train, probably in the night-time, by some swindler, into receiving a spurious bank note, and who on discovering his misfortune, endeavors to get rid of the note the next morning in market by victimizing somebody else, who fails in the attempt, and is arrested and brought to trial for a first offence against the law, committed in an evil moment, without due reflection upon the nature and consequences of his act. It is a strong case for an appeal to executive clemency, but one in which neither the jury nor the court have a right or the power to exercise the high function of pardon.

The most that the court can do is, to suspend the sentence, so as to allow the friends of this young man to make appeal to the President for a pardon, which I hope will be granted him. Sentence will be suspended until the 20th instant.

*United States District Court, Eastern District of Virginia, at
Norfolk, December, 1876.*

UNITED STATES v. CHARLES HARRIMAN.

The authority of the officers in a merchant ship to compel obedience and inflict punishment, is of a summary character, but not of a military character.

Statement of the case.

The right of a mate or other officer of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous misbehaviors on the part of the seamen, or to compel obedience by the seamen to orders which require immediate attention, and admit of no delay. Except where the obedience of the seaman admits of no delay, the officer must consult the master before inflicting blows upon the seaman. But the seaman must submit to blows at the time, and seek his redress by law on coming into port.

The master, when on board, in general has the sole authority during a voyage while at sea, to authorize the infliction of punishment on the seamen.

THE information was in these words:

Be it remembered that L. L. Lewis, United States Attorney for the said district, and who in this behalf prosecutes for the United States, in his proper person comes into the said court, on this the sixth day of December, A.D., 1876, and here gives the said court to understand and be informed, that Charles Harriman, on the first day of November, A.D., 1876, on the high seas, he, the said Harriman, then and there being an officer of the American vessel *Sontag*, to wit, the first mate of the said vessel, unlawfully, from malice, hatred, and revenge, and without justifiable cause, did beat, wound, and otherwise ill-treat certain of the crew then and there on board the said vessel, to wit, John Kennedy, Edward Owen, William Dean, Richard Nicholas, Patrick Tracy, Andrew Olefsin, William Smith, and others, and then and there unlawfully did inflict upon the said John Kennedy, and the other members of the said crew just enumerated, cruel and unusual punishment, against the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Upon a statement of complaint, verified by the oath of John Kennedy, etc., competent witnesses.

The ship *Sontag*, Harriman master, from Liverpool to Hampton Roads, shipped a crew at Liverpool, and set sail about the 4th of October, 1876. On her arrival in Hampton Roads, complaint was made before the United States Commissioners at Norfolk, by the crew (about a dozen in number) of cruelty perpetrated upon them by the first and second mates, while on their voyage on the high seas.

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At the trial of the informations filed by the United States District Attorney, it was shown in evidence that the two officers named made a practice of beating and kicking the men during the voyage, and in the case of two of them, inflicted very cruel treatment. The defendants denied the charge of cruelty and pleaded justification for their conduct.

The offence charged was under section 5347 of the United States Revised Statutes, and the proceedings under sections 4300 and 4305.

The case being novel, and the jury being unaware of the construction put upon section 5320 by the courts, asked for an explanation of that section from the court, which was given as follows :

HUGHES, J.—Disobedience to orders, and especially a deliberate refusal to perform duty, has always been considered as a very high offence by the maritime law, and, if the ship's condition is perilous, justifies quite harsh treatment, at the instant, on the part of the ship's officers. Except in very peculiar cases, the officer must at the time of giving an order be obeyed ; and to secure obedience to his orders the law gives him authority to use force at the moment. In the exercise of this authority, however, regard must be had to the occasion and to the circumstances of the ship, and especially to the character and conduct of the seaman. If the officer exceeds his power, by exercising his authority harshly, or unjustly, or maliciously, he is answerable when he returns to port. It is, however, the duty of the seaman to obey orders and endure cruelty for the time ; placing his reliance upon the courts and juries of his country for justice, on his return to American soil.

But distinction must be made on this subject between the different officers of a ship. The master has generally the sole authority when on board of his ship to authorize punishment to be inflicted on any of the crew. Yet in many cases the safety of the ship may require instant obedience (as, for example, to take in sail) without waiting for any direct authority from the master to compel obedience. But the master cannot delegate to an inferior officer a general authority to inflict punishment ; nor

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can the inferior officer inflict punishment at his own pleasure for any offence of the crew. The authority of any inferior officer to give blows exists only when it is, at the very moment, absolutely required by the necessities of the ship's service, to compel the performance of duty. But if he strikes, he becomes responsible to the country on coming into port.

The master stands in this respect in the relation of parent to the seamen, and is bound to exercise *his own judgment* as to the time, the manner, and the circumstances, under which punishment is to be inflicted on the crew for any past misdemeanors, or for any present misdemeanors not immediately, at a critical moment, affecting the ship's safety. But under all circumstances where an inferior officer inflicts blows, the burden of proof is upon that officer to establish by clear evidence that the blows or punishment were inflicted in the moment of peril to the ship, or in self-defence. Seamen are not to be treated like brutes even though they misbehave themselves; neither has *any officer* of a ship a right to indulge his passions or resentment, by inflicting upon them cruel, or harsh, or vindictive punishment. If an officer does, he is amenable to the justice of his country for his misconduct.

By the word *malice*, used in law, is meant ill-natured wilfulness. It is a wilful intention to do a wrongful act. On one occasion, it was said by an English judge, that malice meant wilfulness. In legal signification it means "a wrongful act, done intentionally, without just cause or excuse." Such is the meaning of the word in the section 5347 of the Revised Statutes of the United States, making the infliction of blows on a seaman from malice an offence. See *United States v. Taylor*, 2 Sum., 584, and *United States v. Hunt*, 2 Story, Circuit Court, 120. See also *Carleton v. Davis*, 2 Ware (Daveis), 221.

The court gives to the jury the following more summary instructions :

1. If the jury believe that Charles Harriman, the first mate of the said ship, on the voyage mentioned in evidence, beat or wounded any of the seamen without justifiable cause, or from malice, hatred, or revenge, they should find the accused guilty; if otherwise, that he is not guilty.

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2. The penalty is to be fixed by the court, and may be from one dollar to a thousand as fine, and from one day to five years as imprisonment.

3. It is within the province of the jury to recommend a lenient penalty, as they may think proper, if they should find a verdict of guilty.

4. The language of the law forbids cruelty to "*any of the crew*" of a vessel, which means any one or more of the crew.

Verdict of "guilty," with a recommendation of leniency.

*United States Circuit Court, Eastern District of Virginia,
April 6th, 1877.*

UNITED STATES v. A. GOLDBACK.

Information for Violation of Section 8430 Revised Statutes of United States.

A parcel or package (in the sense of the clause of section 8437 of the Revised Statutes of the United States relating to lucifer matches) is a bundle put up in form and condition for handling or transportation, or delivery on sale from hand to hand; and, therefore, a match-box of capacity to hold less than one hundred matches, which contains two sliding drawers which are open on the top when drawn out, is but one package or parcel, inasmuch as each drawer is not of itself a parcel or package in the mercantile sense.

THE defendant is a manufacturer of lucifer matches. As a novelty in his line of business, instead of putting up his matches in a box of one compartment, he provides two sliding drawers in each box, the drawers being open on top when drawn out, each holding about forty-two matches, and not large enough to hold by possibility as much as, or more than, fifty; the package holding from eighty to ninety matches.

It is not pretended that there is any design on the part of the manufacturer to defraud the revenue. The information is in the

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nature of a friendly proceeding filed at the instance of the defendant, who wants the question of law tested and decided.

Issues of fact as well as law are submitted to the court.

Plea of not guilty.

HUGHES, J.—Section 3437 provides that friction matches, “in parcels or packages containing one hundred matches or less,” shall be stamped with a one cent stamp on “each parcel or package.”

The device of this manufacturer is a package but little if any greater in size than the ordinary match-box; and it is so contrived that one-half of its contents may be used without disturbance to the other half. That, and its novelty, and not any design to defraud the revenue, are all that distinguish it from the ordinary match-box.

It is contended by the United States Attorney that the two open drawers in each box are to be regarded as each a parcel or package, and that therefore the box itself should be stamped with two one cent stamps.

A package, in the sense of section 3437, means a bundle put up for transportation, or commercial handling. It is a thing in form to become, as such, an article of merchandize, or transportation or delivery from hand to hand. A parcel is a small package; the word parcel being the diminutive of the word package. Each word as used in section 3437 denotes a thing in form suitable for transportation or handling as an article of sale.

Now the drawers in this match-box are not in that form. Taken separately, they are not in condition for mercantile shipment, or handling, or sale from hand to hand. These drawers therefore are not, each, parcels or packages in the meaning of section 3437. There has, therefore, been no violation of section 3430 of the Revised Statutes of the United States upon which this information is drawn, and there must be judgment of acquittal.

L. L. Lewis, for the United States.

H. H. Marshall, for defendant.

Statement of the case.

*United States Circuit Court, Eastern District of Virginia, at
Richmond, April 13th, 1875.*

UNITED STATES v. JOSIAH JACKSON.

Selling an occasional drink of spirits, out of a bottle, not in a bar-room, where no intention of defrauding the national revenues is apparent, is not "*carrying on the business of a retail liquor dealer*" without having paid the special tax, in contemplation of section 3242 of the Revised Statutes of the United States.

THE indictment was for violating section 3242 of the Revised Statutes, which declared (in 1875) that—

"Every person who carries on the business of . . . a retail liquor dealer . . . without having paid the special tax as required by law, shall, for every such offence, be fined not less than one thousand dollars, nor more than five thousand dollars, and be imprisoned not less than six months, nor more than two years."

Section 3244 declares that—

"Every person who sells, or offers for sale, foreign or domestic spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

The proof before the jury was, that Jackson had no license ; that a detective, sent by a revenue officer, had gone to his grocery on one occasion and called for a half pint of whisky and received it and paid for it, the revenue officer looking through the window and seeing the occurrence ; that this same witness (whose veracity was impeached by a half dozen witnesses for the defence) had bought a small quantity of whisky on another occasion ; that two other witnesses had on separate occasions bought drinks at the establishment, it having been poured out of a bottle into glasses for them ; and that on these two occasions a woman had sold the liquor and not the accused. The defence proved by eight or ten witnesses, who all lived near the accused and had known him intimately for many years, that he was a man of excellent character, that he had not carried on the business of liquor dealer in their whole acquaintance with him ; that

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they had on some occasions inquired for liquor at his grocery and could never get it; that he was a member of the church in good standing. These witnesses nearly all concurred in saying that they knew the general character for veracity of the witness who had testified that he had bought whisky of Jackson himself, and that from that general reputation they would not believe said witness on oath. Most of these witnesses also proved that Jackson's wife had died two years before, and that no woman had since assisted him in his grocery.

HUGHES, J.—The court charges the jury that two acts were necessary to make up the offence under trial. First. Carrying on the business of retailing liquor in less quantities than five gallons, and, second, doing this without having paid the special tax required by law of retail liquor dealers. The statute, from the severity of the punishment imposed (this was before the amendment fixing a much lighter penalty), evidently did not intend to punish the offence of selling an occasional drink or bottle of liquor; an offence, the suppression of which it seemed to leave to the police or the local tribunals; but it contemplated the larger offence, really prejudicial to the revenues of the government, of *carrying on the business* of retailing liquor without the payment of the proper tax. This latter offence is a legitimate subject for the cognizance of a United States court; the other offence, which is one merely against the good order of society, is not within the legitimate objects of the jurisdiction of the national tribunals of justice. If they took cognizance of such offences they would interfere in affairs properly belonging to the cognizance of the local courts and police.

It is for the jury to decide how many sales, and what preparation and appointments of a bar-room are necessary, in each case, to constitute the offence of *carrying on the business* of retailing liquor; but the court is clear in instructing them that a few instances of selling liquor in small quantity by persons having no bar-rooms, and none of the usual appliances of retail liquor dealers, with no intention apparent of defrauding the national revenue, do not constitute a *carrying on the business* of retail liquor

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dealing, within the meaning and objects of section 3242 of the Revision.

I find that in the Western District of North Carolina, the United States Circuit Court there has established a standing order in accordance with these views in the following words :

“ No warrant shall be issued by a United States Commissioner against a person charged with retailing distilled spirits or tobacco, unless the affidavit of information shall expressly state that such person has violated the revenue laws by frequently selling such articles.”

The jury brought in a verdict of not guilty.

United States Circuit Court, Eastern District of Virginia.

UNITED STATES v. A DISTILLERY (OF M. & E. MYERS, OF
PETERSBURG, VIRGINIA).

The books of a distiller, kept in accordance with sections 8303 and 8304 of the Revised Statutes of the United States, are *quasi* records, false entries in which, or an omission to make such entries as the law requires in which, or a refusal to produce which, on proper demand, will subject the distillery to forfeiture.

The seizure of such books by a collector of Internal Revenue upon an order of one of the executive departments of the government, given in the legitimate exercise of its duties, is not a “ judicial proceeding ” in the contemplation of section 860 of the Revised Statutes, such as deprives the government of the right to use them as evidence in the trial of a libel for forfeiture filed against such a distillery.

THE facts of the case of the United States against a distillery at Petersburg were as follows :

Section 3303 of the Revised Statutes provides that every distiller shall, from day to day, make, or cause to be made, in a book or books to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, certain specified entries recording in detail his transactions at the distillery. Section 3304 then

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provides that these books "shall always be kept at the distillery, and be always open to the inspection of every revenue officer, . . . and whenever required shall be produced for the inspection of any revenue officer."

On the first day of November, 1875, the collector of Internal Revenue for the second collection district of Virginia, acting under special authority for that purpose from the Commissioner of Internal Revenue, seized the distillery, which is the subject-matter of this action, for a violation of section 3257 of the Revised Statutes, and with it took possession of the books kept upon the premises pursuant to the requirements of section 3303.

At the trial of this suit in the District Court, the United States, to maintain the issue on their part, offered these books in evidence, but the claimants objected to their admissibility, upon the ground that they had been obtained from the distillers by means of a judicial proceeding. This objection was based upon section 860 of the Revised Statutes which is as follows:

"No pleading of a party, nor any discovery or evidence obtained from any party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The District Court sustained the objection and excluded the evidence. To this ruling the United States excepted in due form upon the record, and the question presented for consideration stands upon that exception.

WAITE, Ch. J.—The books of a distiller, kept in obedience to the requirements of the statute, are, so to speak, *quasi* records. They are intended for use as much by the government as the distiller. They constitute part of the machinery which the law has provided for the enforcement of the revenue laws. Their object is to furnish the government with evidence of the daily business of the distillery, and with the means of detecting frauds. They

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are to be preserved two years for that purpose, and are to be produced for the inspection of the proper government officials whenever demanded. They are, in a sense, part of the distillery itself, and as much subject to inspection and use for the purpose of securing the payment of the revenue as the building or any part of the fixtures or apparatus. False entries therein, or an omission to make such entries as the law requires, or a refusal to produce them upon proper demand, will subject the distillery to forfeiture.

The possession of the books in this case was not obtained by means of any judicial proceeding. The seizure was not by virtue of any warrant issued by a court or judicial officer, but upon an order of the executive departments of the government, made in the legitimate exercise of its powers for the enforcement of the laws. The books were taken because found on the premises in the place where the law required they should be kept for the purposes of evidence, to be consulted and considered by the government. They were no more excluded by this statute from use as evidence, on account of the manner in which they were obtained, than were the tubs or other apparatus seized at the same time.

This case is entirely different from that of *United States v. Hughes* (21 Internal Revenue Rec., '76), decided by Judge Blatchford, in the Southern District of New York. There the warrant of seizure was issued by a judge and made returnable to the court (14 Statute, 547, sec. 2). The evidence obtained consisted exclusively of private books and papers, which were in no sense whatever public. They were excluded because they had been obtained under a warrant issued in a judicial proceeding by a judge to a marshal, returnable with the papers, etc., to the judge for his judicial action.

Here, as has been seen, the books were public books, kept for the purposes of evidence, and intended for use as well by the government as the distiller. The United States have the right to demand their production without judicial protest for all purposes connected with the revenue liabilities of the distillers or the distilleries.

We think the District Court erred in excluding the testimony,

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and the judgment must for this reason be reversed. It is unnecessary now to consider any other questions presented by the record, as upon another trial, with additional evidence, the court may be able to find the facts more specifically and definitely than they appear in the present record.

The case is remanded for a new trial.

United States District Court, District of Maryland, at Baltimore, November, 1876.

HARRIET E. CULLY v. BALTIMORE & OHIO RAILROAD CO.

The act of Congress, of March 1st, 1875, entitled an act to protect all citizens in their civil and legal rights (ch. 114, p. 835), so far as it seeks to inflict penalties for the violation of rights which belong to citizens of a State, as distinguished from citizens of the United States, was the exercise of a power not authorized by the Constitution of the United States. The privilege of using for local travel any public conveyance, is in general a right which belongs to a person as the citizen of a State, and not as a citizen of the United States; and the denial of that privilege (except where it is charged in the pleadings, and proved in evidence to have been on account of race, color, etc.), does not subject to the penalties of the said act of Congress.

The counsel in the case were Messrs. Archibald Stirling, Jr., United States Attorney, and Henry C. Wysham, for the plaintiff.

Messrs. John H. Latrobe, J. K. Cowan, and Jas. A. Buchanan, for the defendant.

THIS case was one of eighteen suits brought against the company in which each of the plaintiffs sought to recover the penalty of \$500 imposed by the Supplemental Civil Rights Act of 1875, on the ground that the company had discriminated against them on account of their color by refusing them admission to a car with white passengers, but compelling them to occupy a separate and inferior car.

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On several prayers for instructions to the jury, submitted by counsel on either side, the judge gave the following opinion :

GILES, J.—The case of *Mrs. Cully v. The Baltimore and Ohio Railroad Company*, is one of considerable importance, and the interest taken in it by a large class of our fellow-citizens induced me to do what I very seldom do—postpone the decision from yesterday until such time as I could carefully review the authorities bearing upon the subject. This I had an opportunity of doing last night, and I will now announce the conclusion at which I have arrived :

Allusion has been made by the learned District Attorney to two previous decisions of this tribunal. I will remark that a case similar to the one now being tried was never at any previous time before this court. The cases to which the learned District Attorney alluded, were those of *Alexander Thompson v. The Baltimore City Passenger Railroad Company*, and *John W. Field v. The Baltimore City Passenger Railroad Company*, in both of which cases recovery was had.

In the case of *Thompson* it was an action brought by a citizen of Virginia against the City Passenger Railroad Company for ejecting him from one of its street cars, upon the ground that he was a colored party, and had no right to ride inside of the car. I held in that case that since the colored race was made citizens of the United States by the first section of the Fourteenth Amendment, any discrimination of that kind made by any public conveyance against them, gave them a right of action for such damages as they may have suffered. That case was brought in this court, and its jurisdiction sustained, because while the plaintiff was a citizen of Virginia, the company was a company incorporated by the State of Maryland, and I should so hold again.

The case of *Field v. The Baltimore City Passenger Railroad Company* was a similar case. It was the case of a colored person, a citizen of New Jersey, who had been denied the right to ride in the City Passenger Railway cars. He brought his action against the Passenger Railroad Company and recovered. I held the jurisdiction to be perfectly clear, that no carrier of passengers, no public conveyance, after the colored people were made

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citizens of the United States, could deny them the privilege which other passengers received. Those are the only two cases of that character that have ever come before me.

There were two cases with regard to the Fifteenth Amendment, or right of suffrage. The case of the *United States v. Mason*, from Kent County, and the *United States v. Schumenant, Boone, et al.*, in Anne Arundel County. I held in those cases that while the right of suffrage had not been granted by the Fifteenth Amendment, yet there had been granted a right not to be discriminated against, and the learned pleader of this court, with his usual caution, had embraced in these indictments the fact that they were rejected because they were colored people, and on account of their race, color, and previous condition of servitude, and I held, therefore, that while the Congress could not give the right of suffrage they could protect it. I held, although the section looked to hostile legislation by the States, yet that under the last clause of the section, which gave them the right to enforce it by appropriate legislation, while they could not act criminally upon the State, they could punish those persons who denied to them the right to be protected against discrimination, the article in the Constitution of the United States guaranteeing protection to the citizens in that regard.

In that view I think I am sustained by the late decisions on that point. I merely allude to this, as my friend, the learned District Attorney, alluded to the decisions of this tribunal in former cases.

The question presented in the present case is a very different one. You will now observe the reason why I inquired of the District Attorney, before the argument proceeded, upon what article of the Constitution of the United States he found the right to ride in cars engaged in the local travel of the State. You will observe the point of that question and its pertinency. Now what does it say? "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside." That makes them citizens. They are all citizens entitled to every right which a white citizen has in the States, and entitled to all rights which citizens of the United States possess in each. "No State shall

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make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Now the Supreme Court has held—and these decisions have all been since I decided the cases to which I have referred—in the case of the *United States v. Reese et al.*, and the *Slaughter-house Cases*, that this article of the Constitution only protected such rights as belonged to a citizen of the United States. We all know the history of the *Slaughter-house Cases*. There the legislature had undertaken to provide an abattoir, covering all the city, and saying no hogs, and no cattle, etc., should be slaughtered in any other place than within this inclosure, and that every butcher should carry his animals there to be slaughtered. The parties, who were butchers in New Orleans, thought this was an infringement, and that they were protected. They thought, as no doubt the pleader in this case thought, that all rights of a citizen were protected under this article of the Constitution, and suits were brought to test the validity of this act.

The Supreme Court (and that was a case that came up under this very section) held there that the first clause of the fourteenth article was primarily intended to confer citizenship on all persons born or naturalized in the United States, and to declare them citizens of the United States, and citizens of the State wherein they resided, and it recognized the distinction between citizens of a State and citizens of the United States.

The second clause, and the one we are dealing with here, protects from the hostile legislation of the States the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the States, and they go on therefore to declare in that decision that the law of Louisiana in regard to the *Slaughter-house Case* was no violation of the Fourteenth Amendment, and the party there had no protection under it; that for all privileges and immunities guaranteed to a citizen by the laws of his State, he must look to the State and her tribunals for protection and for redress, but for immunities and privileges which belong to him as a citizen of the United States, as such, this article protected him, and he could seek his recovery in the courts of the United States. And the court in its opinion (and it is a very able opinion) say, "It may be asked what,

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if any, are the rights of citizens of the United States as such?" The court enumerated a great many. The right to travel to the National capital on business of the government, the right to proceed to a port of the United States for foreign travel, and many others of a similar character, are rights which belonged to a citizen of the United States, from the organization of the government, and from its inception, independent of any special legislation, and it is only such rights that this article intended to protect. I need not go through with all the cases. It is carried out in the cases of the *United States v. Reese et al.*, and *Cruikshank et al.* But the *Slaughter-house Case* was the first one that announced this doctrine, and it was the first one that called the attention of the people of this country to the distinction between rights that belonged to citizens of the States, and the rights which belonged to the citizens of the United States as such.

Now, gentlemen, if that is the law, and certainly no one can read those authorities without being convinced, for the Supreme Court have never been clearer than they have been on this subject; whatever might have been my views before, it has always been my privilege and my pleasure, as it is my duty to carry out the decisions of that high tribunal. Taking, therefore, this view of the case, gentlemen, I shall give one instruction which ends the case, and the jury will render the verdict for the defendant.

Here is my instruction: I reject all the other prayers. I would remark that I have not considered one proposition argued by the learned counsel for the defendants here, and argued by the learned District Attorney with regard to the character of this action. I should rather be inclined to think that the District Attorney, in his argument was right; that while it is an action for a penalty, it is an action at law, and the parties, therefore, would have the same rules applied to them as they would in any other action at law. But I have not looked at the authorities on that point.

The act of Congress of March 1, 1875, under which this action is brought, so far as it seeks to inflict penalties for the violation of any or all rights which belong to citizens of a State, and not to citizens of the United States as such, was the exercise of a power not authorized by any provision of the Constitution of the

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United States, and as the privilege to use for local travel any public conveyance is not a right arising under the Constitution of the United States, there can be no recovery of the penalty sued for in this case, and the jury will render their verdict for the defendant.

Exceptions to the ruling of the court were reserved by the United States Attorney, and the case went to the Supreme Court of the United States.

The jury were then polled, and in accordance with the instructions of the court rendered their verdict for the defendant. The cases of the seventeen other plaintiffs were disposed of by this result.

*United States Circuit Court, Western District of North Carolina,
at Greensboro', April, 1875.*

THE CIVIL RIGHTS BILL.

In North Carolina, the equal rights, in inns and public conveyances, of all persons without distinction of class, are fully protected by State statutes, and existed as to inns at common law; and the act of Congress commonly called the Civil Rights Bill, was unnecessary in the State; and its only effect is to give jurisdiction of wrongs committed against citizens on account of class to the Federal courts.

These laws, State and National, were intended to secure political and legal equality of rights to all citizens, but were not intended to establish social equality, or to enforce social intercourse between different classes of citizens.

Quære. Whether the Civil Rights acts of Congress are constitutional in so far as they legislate upon the rights which appertain to men in their character as citizens of the States as distinguished from those which belong to them as citizens of the United States?

The United States Grand Jury.

THE following opinion was given in response to inquiries from the grand jury, in regard to their duties under the act of Con-

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gress just then passed, commonly called the Civil Rights Bill. See acts of 1874 and 1875, ch. 114, p. 335.

DICK, J.—I will consider the subject in the following order :

1st. What was the existing law before the passage of the act.

2d. The provisions and purposes of the act.

3d. Had Congress the constitutional authority to pass the act.

Under the Constitution and laws of the United States, and the Constitution and laws of this State, the colored man is a free citizen, and entitled to the legal rights of all other citizens.

We propose, in the first place, to inquire what were the rights of persons at common law, before the passage of the Civil Rights Bill, as to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances by land or water, theatres, and other places of public amusement. We will confine our attention chiefly to inns, as the principles of law in such cases are applicable to common carriers, and other public undertakings and employments. By referring to standard works which treat of this subject at common law, we will find the following principles established by frequent adjudication :

A person who makes it his business to entertain travellers and passengers and provide lodgings and necessities for them and their horses and attendants, is a common innkeeper ; and it is no way material whether he have any sign before his door or not. 3 Bac. Ab., 660.

The duty of innkeepers extends chiefly to entertaining and harboring travellers, finding them victuals and lodgings, and securing the goods and effects of their guests ; and, therefore, if any one who keeps a common inn refuses either to receive a traveller as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury, in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king. For he who takes upon himself a public employment must serve the public as far as his employment goes. Ibid., 662. Also it is said that an innkeeper

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may be compelled by the constable of the town to receive and entertain a person as his guest. *Ibid.*, 664.

An inn has been judicially defined to be "a house where the traveller is furnished with everything which he has occasion for whilst on his way." But a mere coffee-house, or eating-room or boarding-house, is not an inn. 1 Parsons, 623.

One who entertains strangers occasionally, although he receives compensation for it, is not an innkeeper. Mathew's case; 2 Dev. & Bat., 424.

An innkeeper may refuse to receive a disorderly guest, or require him to leave his house. He is not bound to examine into the reasonableness of the guest's requirements. And while travellers are entitled to proper accommodations, they have no right to select a particular apartment, or to use it for purposes other than those for which it was designed. 1 Parsons, 523.

The law only obliges an innkeeper to furnish proper and convenient accommodations for his guests, and in doing this, he may arrange his business to suit his own advantage, while he complies with the reasonable requirements of his guests.

This State and other States of the Union, have statute regulations upon the subject of inns. In every prosperous and commercial country there are laws upon this subject, as travellers and men of business must have places of entertainment where their reasonable wants of lodging and subsistence can be conveniently obtained.

We find in ancient Rome, that the prætors established many wise regulations for the accommodation of travellers, which are very similar to the principles of the common law and our State statutes.

In this State we find a statute originally passed in 1798, which provides, that: Every person wishing to keep a common inn, tavern or ordinary for the entertainment of travellers and others, shall apply to the board of county commissioners for a license to do so, "and the applicant must give bond in the sum of one thousand dollars, payable to the State of North Carolina," and conditioned for finding and providing good and wholesome diet and lodgings for his guest, and stable and provender for their horses; and also to safely keep for his guests all

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such articles and property as may come to his care and charge as an innkeeper; and on breach of any condition thereof, any person injured may put the same in suit. Bat. Revisal, ch. 81.

This is a statute remedy in addition to the remedies at common law, and is secured by bond with sufficient sureties. This statute asserts the rights provided for in the Civil Rights Bill, and secures them more effectually than the act of Congress. The penalty in the act of Congress is five hundred dollars without any security; but any damages incurred are secured in the State statutes by a thousand dollar bond with sureties. In both instances, if the statute remedy is pursued by the party injured, the common law remedies are waived.

It is thus apparent that all the rights to the full and equal enjoyment of the advantages, accommodations, facilities, and privileges of inns, public conveyances, etc., are derived from the common law and State statutes, and fully existed before the passage of the Civil Rights Bill. By the common law and statutes of this State, no discrimination is made against colored men as a class, or against non-resident citizens.

The Civil Rights Bill was, therefore, it would seem, unnecessary, so far as this State is concerned; and being unnecessary, the question arises whether Congress, under any provision of the Constitution, had the authority to legislate upon domestic and local subjects, which are properly under the control of State action. We will consider this question in a subsequent part of this charge.

Both the National and State governments have conferred upon the colored man all the legal rights of citizenship, and *both* governments would be untrue to themselves if those rights were not properly protected and enforced by suitable legislation.

In political circles it may be said that the rights of citizenship ought not to have been conferred upon the colored man by the General government, and the Southern States acted under an unwarranted compulsion when they recognized and established those rights in their new State constitutions. Those States entered into a rebellion against the General government, to protect and secure the institution of slavery, and the rebellion was suppressed by force of arms, and the government imposed upon those States

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certain fundamental conditions as prerequisites to their readmission into the Union. These fundamental conditions were accepted by the insurrectionary States, and were incorporated into their constitutions.

The full rights of citizenship were thus conferred upon colored men by the amendments of the National and State Constitutions, and directly resulted from the rebellion, and were not created by the Civil Rights Bill.

If these rights were unjustly and improperly conferred the wrong is attributable to the rebellion which brought on such consequences. These amendments to the National and State Constitutions have been approved and adopted by the people in the manner provided by our fundamental law and are now a part of the law of the land, which courts of justice are bound to administer.

We will now consider what are the provisions and purposes of the Civil Rights Bill.

The first section enacts: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to the citizens of every race and color, regardless of any previous condition of servitude.

The second section provides that any person who shall violate the first section, shall be liable to a penalty of five hundred dollars, and also to an indictment for misdemeanor: the penalty to be recovered by suit of the party injured, and the indictment to be prosecuted in the Federal courts.

The third section gives to the Federal courts exclusive jurisdiction of the suit and indictment mentioned in section 2, and makes it the duty of district attorneys, marshals, deputy marshals, and United States commissioners, to see that all offences under section 2 are properly prosecuted.

Section 4 provides that no citizen shall be excluded from jury service in the National or State courts on account of race, color, or previous condition of servitude.

Section 5 provides that all cases arising under this act in the

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Federal courts, may be reviewed by the Supreme Court without regard to the sum in controversy.

In this act we find all the usual safeguards which are adopted in the enactment of laws to prevent oppression and secure the rights of individual citizens.

The purposes of the bill are fully expressed in the preamble :

“Whereas, we recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color or persuasion, religious or political.”

From the preamble and all the provisions of the act, it is obvious that the Civil Rights Bill neither directly nor indirectly confers, nor was intended to confer any rights or privileges of social equality among men. Neither have the recent amendments of National or State Constitutions any such purposes or effect. Every man has a natural and inherent right of selecting his own associates, and this natural right cannot be properly regulated by legislative action, but must always be under the control of individual taste and inclination.

There have always been different circles in society, and this condition of things will ever remain among men. This natural right and inclination of selecting associates exists among the animals of every species.

Even in free and enlightened Athens we find among the citizens of the republic well-defined social distinctions which could not be regulated by public law. The Athenians would not associate on terms of social equality with the most learned and distinguished foreigners, who were regarded as barbarians. They once put a citizen to death for interpreting into the language of his country the message of a Persian king. The iron laws of Sparta placed the citizens upon terms of social equality, and made them a nation of savage warriors and ignorant barbarians.

The founders of Rome were a band of robbers and outlaws and mingled in free and equal social intercourse ; but when Romulus selected the *Centum patres*, the social distinction of Patricians and Plebeians was established, which for seven hundred years disturbed the peace of the kingdom and commonwealth, and led to the establishment of the empire.

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In England political and social distinctions have always existed, and cannot be broken down without the complete subversion of the government.

The hope and expectation that there will ever be a nation on earth in which all men will associate upon terms of social equality is a wild dream of fanaticism, which can never be realized.

It certainly cannot be a matter of surprise that among the white people of the Southern States, there should be strong opposition to according equal social privileges to the colored race. The colored men were formerly slaves, and the condition of servitude rendered them greatly wanting in education, refinement and social culture.

White men often came in contact with colored men, but the association was that of superiors with inferiors. Before the war, white men who associated with colored men on terms of social equality became degraded in the eyes of the community. These social prejudices naturally resulted from the condition of things and are too deeply implanted to be eradicated by any legislation. Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious. There is no principle of law, human or divine, that requires all men to be thrown into social *hotchpot* in order that their equality of civil rights may be secured and enforced.

The Civil Rights Bill neither imposes nor was intended to impose any such social obligation. It only proposes to provide for the enforcement of legal rights guaranteed to all citizens by the laws of the land, and leaves social rights and privileges to be regulated, as they have ever been, by the customs and usages of society. I will briefly restate the principles of law which we have been considering as they exist in this State, independent of the Civil Rights Bill. The law only requires innkeepers, common carriers, etc., to furnish accommodations to colored men, equal to those provided for white men, when the same price is paid. Innkeepers may have separate rooms and accommodations for colored men, but they must be equal in quality and convenience to those furnished white men. Railroad companies

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may have first class coaches for colored men, and first class coaches for white men. If white men are protected from the intrusion of colored men, colored men must likewise be protected from the intrusion of white men, as the legal rights of both classes are the same. Both races are alike entitled to receive convenient and comfortable accommodations in inns and public conveyances, and neither a white man nor a colored man has a right to say that the innkeeper shall put them in the same room without their mutual consent. If a traveller gets inn accommodations and comfortable transportation according to the price paid, he has no just cause of complaint, and the innkeeper and common carrier discharge the obligations imposed upon them by law. If the innkeeper tenders such accommodations, and the guest refuses them, he may compel the guest to quit the inn, and seek for accommodation elsewhere. *Falls v. Knight*, 8 Mees. & Wels., 276.

I have thus stated the conditions and limitations established by the common law and statute law of North Carolina, regulating the relative rights and responsibilities of innkeepers and their guests. If any person within the jurisdiction of this State is denied his legal rights by an innkeeper, the party injured has the following remedies under the State laws:

1. By civil action and indictment at common law, prosecuted in the superior court.

2. By civil action on innkeeper's bond, as provided by statute.

If these legal rights cannot be properly enforced by a colored man in the State courts, then he may remove his suit in the State courts to the Federal court, under the Civil Rights Bill of the 9th of April, 1866.

Thus, it would seem that under existing laws in this State, the colored man has all the rights and remedies of any other citizen, in relation to the subjects embraced in the Civil Rights Bill. I am not aware that there is any law in North Carolina which in express terms makes any discrimination against the colored race, except the statute regulating the domestic institution of marriage, and this subject is and must ever remain under the exclusive control of local State government.

It has been alleged that a few municipal charters granted by the present legislature, in effect deprive colored citizens of some

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elective franchises which are enjoyed by white citizens. This subject is not embraced in the Civil Rights Bill, and calls for no expression of opinion in this charge.

We will now proceed to consider the important question as to what extent Congress has the constitutional authority to establish and regulate the civil rights of citizens of the United States in the several States.

This question has recently been elaborately considered by the Supreme Court of the United States, in the *Slaughter-house Cases*, 16 Wallace, 36, and also by the Supreme Courts of Ohio and Indiana in the cases of *State v. McCann* and *Cory v. Carter*. In these cases the following principles of law may be regarded as established. We only refer to the salient points pertinent to our discussion.

Previous to the adoption of the recent amendments to the Constitution of the United States, with the exception of a few express prohibitions and restrictions in the Federal Constitution, "the entire domain of the privileges and immunities of citizens of the States lay within the constitutional and legislative power of the States, and without that of the Federal government."

The States, with the restrictions and prohibitions referred to, could establish and regulate the civil rights of their own citizens. But when those rights are established by State laws, the Constitution declares to the States that those rights, neither more nor less, shall be the measure of the rights of the citizens of other States within their jurisdiction. And quoting from the language of Chief Justice Taney in another case, it is said, "that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States," and it is as such citizens that their rights are supported by the United States courts.

The recent amendments to the Constitution were intended to secure freedom and the benefits of citizenship to colored men, and protect their civil rights against hostile State legislation. All State laws which discriminate against colored men as a race, and deny them equal civil rights with other citizens, are now prohibited by the Constitution, and may be declared unconstitutional

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by the courts; and Congress may also enforce the civil rights thus denied, by suitable legislation.

A State has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, etc., but cannot deny to any citizen of the United States, within its jurisdiction, the equal protection of the laws. In the *Slaughter-house Cases*, it is said, "the clause which forbids a State to deny to any person the equal protection of the laws, was clearly intended to prevent the hostile discrimination against the negro race, so familiar in the States where he had been a slave, and for this purpose the clause confers ample power upon Congress to secure their rights and equality before the law. We doubt very much whether any action by a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

As no such contingency had arisen in this State, as is contemplated by the Fourteenth Amendment, it may well be considered as a matter of grave doubt whether Congress had the constitutional authority to legislate upon matters properly belonging to the local and domestic government of the State, when the State had in no way denied to persons within its jurisdiction the equal protection of the laws.

In a charge to a Grand Jury I will not pretend fully to discuss and decide upon the constitutionality of the Civil Rights Bill, as this is an exceedingly delicate and important question, and one that has induced much public consideration and excitement.

Judge Cooley, in his learned and valuable treatise on constitutional limitations, at page 159, says :

"It must be evident to any one that the power to declare a legislative enactment void, is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously do so, and with due regard to duty and official oath, decline the responsibility.

"Neither will a court, as a general rule, pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause.

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While the court cannot shun the discussion of constitutional questions, when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions.

"It is both more proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled."

The constitutionality of the Civil Rights Bill has been asserted by the deliberate action of Congress, composed of many able lawyers and wise and enlightened statesmen, and it would be very presumptuous in me, collaterally, and without argument, to decide differently upon a question which that body carefully considered and acted upon under the solemn sanction of official obligation. "It is a solemn act in any case to declare that that body to whom the people have committed the solemn function of making the laws of the commonwealth, have deliberately disregarded the limitations imposed upon their delegated authority, and usurped power which the people have been careful to withhold." Cooley, Cons. Lim., 160.

This question will doubtless soon be decided by the Supreme Court of the United States, and when determined by that august tribunal, I feel confident that the decision will be acquiesced in by all the American people disposed to observe the law of the land.

Although the constitutionality of the Civil Rights Bill may be questioned, the act cannot properly be regarded as an oppressive exercise of legislative power. It only re-enacts the law already in force in this State, and furnishes new remedies not more stringent than those existing at common law and under our State statutes. It provides that those remedies shall be enforced in the Federal courts, where all cases are tried by juries composed of just, impartial and enlightened citizens of the State, selected as State juries are selected; and the legal rights of parties are under the final control of the Supreme Court of the United States, consisting of learned and just judges, whose opinions are regarded as high authority in all the courts of this country and England.

In the Civil Rights Bill the legislative will of the nation has

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been solemnly expressed by the chosen representatives of the sovereign people; and it is to be hoped that all good citizens will yield obedience to the law, feeling well assured that the vexed and difficult constitutional questions which it involves, will be properly determined, and the rights of all citizens be justly administered by the judicial department of the government. This course of conduct will be in conformity to the true theory and spirit of our Federal and State governments, and manifest the patriotic loyalty of our people.

If, therefore, any bill of indictment founded upon the Civil Rights bill is presented by the District Attorney for your action, it is your duty to pass upon such bill as you pass upon all other bills, and leave the constitutionality of the act to be determined by the court upon mature consideration, after being aided and enlightened by the careful investigations and able and learned arguments of counsel.

*United States District Court, District of Maryland, at
Baltimore, 1863.*

UNITED STATES v. HAZEL B. CASHIEL.

An acquittal before a court-martial cannot be pleaded in defence of an indictment in a court of law; even though the offence charged in either case be substantially the same.

IN the month of June, 1863, the accused had at pasture on his farm, in Montgomery County, Md., some five hundred head of cattle, which, with some five hundred others, belonging to the United States, were driven away, on the morning of the 28th of that month, for their protection from the confederate cavalry, then approaching. Soon thereafter, the invading forces riding up to where several persons, including the accused, were standing, demanded in what direction the cattle had gone. One person pointed them in a direction opposite to the true one. In a few minutes one of the cavalymen returned from the pursuit, and repeating the demand, the accused is alleged to have indi-

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cated to him the road which the cattle had taken, their number, and the fact that they were driven without any guard except their ordinary herdsmen. This information did not result in any benefit to the enemy, as the cattle were driven safely within the Federal lines. Shortly after this occurrence Mr. Cashiel was arrested, taken to Washington, and there tried by a court-martial, on the charge of conveying intelligence to the enemy, contrary to the 57th article of war.

The court which tried him, after maturely considering the evidence adduced, found the accused of the specifications and charge guilty, but say "that, although the accused answered certain questions put by rebels, which, in a strict literal sense conveyed intelligence to the enemy, it has not appeared in evidence that the information was volunteered, nor does the court perceive that such intelligence was given with that criminal design which the law contemplates as the animus of a breach of the 57th article of war; and the court, therefore, affixes no penalty to the offence beyond an admonition, that in future he will be more on his guard in answering inquiries addressed to him by an enemy." The Secretary of War approved of the findings of the court, upon the specifications and charge, and disapproved of the sentence; and, after a review of the testimony and proceedings of the court, in an order from the War Department, dated July 29th, 1863, says: "Although the accused has been relieved of all responsibility under the 57th article of war, he is still liable to be prosecuted under the 2d section of the act to suppress insurrection, etc., approved July 17th, 1862, for giving aid and comfort to the rebellion, and that the prosecution for this offence may be proceeded with he will be handed over to the civil authorities."

After the passage of this order Mr. Cashiel was again arrested, and an indictment afterwards found against him in the United States District Court of Maryland, September term, under the act of July, 1862.

When the case was called for trial at the present term of the court, the counsel for Mr. Cashiel put in the plea of *autre fois convict*, averring that as he had been before tried by the proper tribunal, he could not be again impeached and put in jeopardy

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for the same offence. To this plea the United States demurred, and the questions involved in the case were argued by William Schley, Esq., of Baltimore, and Charles Abert, Esq., of Montgomery County, for the traverser, and William Price and Nathaniel L. Thayer, Esqs., for the government.

GILES, J.—The 2d section of the act of 17th of July, 1862, under which the traverser stands indicted, is as follows: "That if any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any existing rebellion or insurrection, and be convicted thereof, he shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court."

The trial and conviction which forms the subject-matter of the plea filed in this case, was had before a general court-martial, held in the city of Washington, in pursuance of orders from the War Department. The charge against the traverser before that court was for a violation of the 57th section of the article of war, which article is as follows: "Whoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of the court-martial." (See act of 1806, 2d vol. statutes, 366.) Two questions have been presented in the argument of this case:

1st. Had the court-martial, whose record is referred to in the plea filed in this case, jurisdiction of the offence there charged and over the person of the traverser? And if so,

2d. Is the said charge the *same offence* (within the meaning of the Fifth Amendment to the Constitution of the United States) for which the traverser now stands indicted?

I shall discuss the second question, for if that be answered in the negative, it overrules the plea filed in this case; and it becomes unnecessary to consider and decide the first. They have both been argued with great ability, and the first question,

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touching the jurisdiction of courts-martial, presents at the present time a painful interest. It is a question with which our previous reading had not made us familiar, for, until the present widespread insurrection, the administration of our General government had been known to us only by the exercise of its peaceful civil powers, and by its laws executed and enforced by the national judiciary. But our Constitution was made for all time—a time of war as well as a time of peace; and what is the extent and limit of the war power it imparted to the government, presents a problem of no easy solution, but one which is now engaging the attention and careful consideration of the statesmen and jurists of the land. As the view I take of this case relieves me from the consideration at present of so grave a question, I will only add, before I pass from it, that the more I study the Constitution of our country the more am I impressed with the wisdom, the forethought, and the experience of the great men who framed it. And my firm conviction is, that our only pathway of safety and hope for the future lies in a strict observance of all its provisions. Now, what is meant by the word "*offence*," as used in the Fifth Amendment to the Constitution? This is settled by the Supreme Court in the case of *Moore v. The People of the State of Illinois*, reported in 14 Howard 17, where Justice Grier says, in delivering the opinion of the court, "An offence in its legal signification means *the transgression of a law*."

In this case we have *two laws*—the articles of war, as contained in the act of 1806, and the law of 1862, which I have before cited—and their provisions are different. The 57th article of war punishes the holding of any *correspondence* or the *giving of any intelligence* to the enemy. For in a time of war (when alone this article operates) it might be prejudicial to the discipline and good order of the army that any correspondence should be held by any of its members with the enemy, although the intelligence given might be in no manner in furtherance of that enemy's views and designs. Whereas, no conviction could be had under the act of 1862, unless the intelligence given was of such a character as to give aid and comfort to those engaged in the insurrection. It might very well be, then, that facts which would

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warrant a conviction under the 57th article of war could produce no such result in an indictment under the 2d section of the act of 1862. And many facts would warrant a conviction under the law of 1862 which are not punishable under the 57th article of war. These are laws to be administered by different tribunals, and they create distinct offences. And there was no law of the United States punishing by indictment corresponding with the enemy or giving them intelligence (unless it amounted to treason under the act of 1790, or as giving aid and comfort to the rebellion under the act of 1862) until the act of the 25th of February, 1863, and that only punishes correspondence, either written or verbal, where it is carried on with "intent to defeat the measures of the government, or to weaken, in any way, their efficacy." When Congress, in 1806, was framing the articles of war, they provided, by the 33d article, that whenever an officer or soldier should be accused of a capital crime, or of having committed any offence against the person or property of any citizen, such as is punishable by the known laws of the land, he should be delivered over to the civil magistrate for punishment. And although by article 9 they provided a punishment for an officer or soldier striking or drawing a weapon upon, or offering any violence to his superior officer, it could not be contended that this provision debarred the civil courts from punishing the offence as an assault and battery. And although the act of 1806 does not contain the provision to be found in the mutiny acts of Great Britain, "That nothing in it shall be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law," yet it appears to me that that is its true construction; that the military law, as it exists in the United States, is an exceptional code, applicable to a class of persons in given relations, but not abrogating or derogating from the general law of the land, but that the latter is left in full force and virtue. Tytler, in his *Treatise on Military Law*, says: "The martial or military law, as contained in the military law and articles of war, does, in no respect, either supersede or interfere with the civil and municipal law of the realm." He is an Englishman, and treating of the laws of that country. But what say the two most approved writers on military law in this country? *Benet*, on page 100

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of his treatise, says: "A former acquittal or correction of an act by a civil court, is not a good plea in bar before a court-martial on charges and specifications, covering the same act." And *De Hart*, on page 140, says: "A former acquittal or conviction pleaded, must have reference to a trial by a court-martial. The same acts, as they may offend against the rights of private persons, may also violate the proprieties of military discipline, and as such may be investigated by both civil and military courts. This is a principle perfectly well established in the military service, and has been acted upon and approved by the highest authority." And both these accomplished writers cite the case of *Captain Howe*. In May, 1842, Captain Howe, of the 2d Dragoons, was tried upon a charge for "conduct prejudicial to good order and military discipline," in having beaten or caused to be beaten, in a cruel and inhuman manner, a private of his company. Upon arraignment, Captain Howe pleaded, in bar of trial, that he had been tried and acquitted for the said act upon an indictment for manslaughter in the civil court. But the court would not admit the validity of such plea, and proceeded to trial. Captain Howe was convicted upon the charge and sentenced to be suspended from rank, pay and emoluments for twelve months. The proceedings and decision of the court were approved and confirmed by the War Department, by General Order No. 34, in 1842. John C. Spencer, of New York, was then Secretary of War, himself a lawyer of considerable reputation in his day. Now the civil court before whom Captain Howe had been tried and acquitted was not, as the learned counsellor for the traverser supposed, a court of a different sovereignty, a court of a State; but Florida was then a territory, and the trial took place before the Superior Court for the Territory of East Florida, a court established by Congress by the act of May 20th, 1824. The judge, district attorney and marshal of said court were appointed by the President, by and with the advice and consent of the Senate, and their salaries were paid out of the treasury of the United States. It was a court whose only power was derived from the authority of the United States, and which possessed the usual jurisdiction belonging to the district and circuit courts of the United States, in addition to a jurisdiction to administer the

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local laws of the Territory of Florida. And the opinion of Mr. Legare, the then attorney-general (one of the most accomplished lawyers of the day), sustained the course of the court-martial in this case. It is therefore an authority entitled to great respect. It was not until 1845 that Florida was admitted into the Union. If this be a sound law, then it must follow that an acquittal before the court-martial could not be pleaded to an indictment before the civil court. And, as the Supreme Court say in the case in 14 Howard, 17. "It cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable." The great principle that in the administration of criminal justice no person should be twice put in jeopardy of life or limb for the same offence is much older than our Constitution. It existed as a fundamental rule of the common law from a very early period, and is recognized by all English writers on common law. But it is limited to forbid a second trial *for one and the same offence*. Blackstone, 4th vol., page 336, says, "that the pleas of *autre fois acquit* and *autre fois convict* must be upon a prosecution for the same identical act and crime." And although an acquittal on an appeal was a good bar to an indictment, yet he informs us on page 313 that an appeal was a prosecution for some heinous crime, demanding punishment on account of the particular injury suffered, rather than to vindicate the public justice. The view I take of the provision in the Fifth Amendment to the Constitution does not, therefore, conflict with this humane principle of the common law. Under each, a former trial, to be a bar, must be a trial for the same identical offence, or, in other words, for the transgression of the same law. As opposed to this view, I have found but two authorities, a dictum of Justice Woodbury, in the case of *Wilkes v. Duncan*, 7 Howard, 123, and a note on page 341, 1st volume of the 9th edition of Kent's Commentaries. The case in 7th Howard was an action of trespass, brought by a marine against Commodore Wilkes, for some punishment inflicted on plaintiff while on board one of the vessels of the Exploring Expedition. A court-martial which was convened after the return of the expedition had acquitted the defendant of this charge. On the trial of this case in the court below the

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record of the proceedings of the court-martial had been offered as evidence, but rejected by the court. The propriety of this rejection having been considered by the Supreme Court, Justice Woodbury, in delivering the opinion of the court, says: "We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offence." Now no such point was presented in the case, and no contingency could ever arise as to crimes committed on a ship-of-war, for the reason I shall state in reviewing the other authority. I have very great respect for the memory of Judge Woodbury, whose judicial life was illustrated by great legal learning and patient, untiring industry, but the language I have quoted was an *obiter dictum*, and is overruled, I think, by the subsequent decision of the Supreme Court to which I have referred. The commentator in Kent's Commentaries discusses the proposition that the district and circuit courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by statute, and have not, therefore, any jurisdiction over offences committed on board of one of our national ships-of-war, as no such jurisdiction is given by any statute. Judge Betts so held in the case of Captain Mackenzie, and that the jurisdiction of the naval court-martial in his case was exclusive, he being then on his trial before a naval court-martial for murder on board the United States sloop-of-war Somers. The commentator goes on to say, "if they (the civil courts) had jurisdiction, an acquittal by a court-martial would be a bar to any criminal proceeding in any other court." But he cites no authority to sustain this position; and as no notice is made of the decision in 14 Howard, I think the note must have been written before that decision was made by the Supreme Court. As instances in which a man may be punished twice for the same act where it constitutes two offences, I cite the case of General Houston, who, having assaulted a member of the House of Representatives, was punished by the house for the contempt, and was subsequently indicted and convicted for the same assault in the Criminal Court in the District of Columbia. The opinion of Mr. Benjamin F. Butler, the then attorney-general, was taken upon the subject, and he held the subsequent trial and conviction

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legal. In his opinion he says: "The act committed by General Houston was one and the same, and it constituted but one indictable offence, and he was liable therefore to only one conviction on indictment." But it was not the same offence for which he was punished by the House of Representatives.

I also cite the case of *State v. Yancey*, reported in 1 North Carolina Law Repository, 519. In this case it was decided that for an assault committed in the presence of the court, and for which contempt the court punished by a fine, the party could be afterwards tried for the assault and battery. It appears to me, therefore, that before I can decide a charge to be "*the same offence*" within the meaning of the Fifth Amendment to the Constitution, it must appear that the offence was the same in law and in fact. In the case at bar, the traverser is charged with a violation of the act of 1862 by giving aid and comfort to those in rebellion. The charge on which he was tried before the court-martial was for giving intelligence to the enemy, in violation of the articles of war. I consider that identity wanting which would make his trial on this indictment a violation of the Constitution of the United States. The demurrer is sustained, and the traverser's plea of *autre fois convict* is overruled, with leave to him to plead over.

United States Circuit Court, Western District of North Carolina, at Asheville, May, 1875.

UNITED STATES v. NOAH H. RICE.

If a person charged with an offence against the law, after making public threats against the life of an officer ordered to arrest him, when that officer proceeds to make that arrest, so acts with rifle in hand, as to make that officer believe that he intends to execute his previous threat, the officer is justified in the instant of danger to himself in taking the life of the person to be arrested.

On the 15th of last September, Andrew Woody, of Spring Creek, Madison County, was killed by Noah H. Rice, a United

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States deputy marshal, who was endeavoring to serve a *capias* on him for violation of the Internal Revenue Laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant Rice if he attempted to arrest him. When this officer came upon Woody the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defence he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States court, on Tuesday, May 11th, 1875. He was placed upon trial for his life. The jury having requested full instructions from the bench, they were given as follows by

DICK, J.—As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved.

In this court in a trial for crime before one judge, defendants have no right to appeal, and the only remedy which they can have for misdirections to the jury on the part of the judge, is a motion for a new trial to be heard before the other judges of the court who were not present at the trial; then, upon a certificate of a division of opinion between the judges upon questions of law, the case may be carried to the Supreme Court for review.

In all capital felonies tried by me sitting alone, I will allow defendants who may be convicted the benefit of these remedies; and I will always reduce to writing my instructions to the jury, so that if I commit an error it may be corrected by the other judges who are authorized to preside in this court. All persons whose lives are put in jeopardy by a trial in court ought to have the benefit of all remedies afforded by law to guard against error and injustice.

The humane and remedial provisions of the law ought to be fully afforded by courts of justice in favor of human life.

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The defendant in this case is charged with murder by an indictment found in the State court, and removed under the provisions of an act of Congress to this court. This court has no original jurisdiction of the offence charged, but the case must be tried in the same manner as cases originating in this court; that is, the forms and modes of proceeding and the rules of evidence must be regulated by the course and practice of this court in criminal trials. The law which defines the offence is the criminal law which prevails in this State.

This indictment is not founded upon a State statute, but is for an offence at common law. The laws of this State declare that the common law, with certain specified modifications, shall be in full force in this State. If the indictment was founded upon a State statute, we would be bound to regard the construction and exposition placed upon such statute by the Supreme Court of the State as a rule of decision. As it is founded upon the common law, we will look to the decisions of the State Supreme Court as highly important guides, but not as absolute authorities. We are at liberty to derive information as to the principles of the common law from the decisions of all the courts of England and this country which profess to administer criminal justice according to that wise, just, and time-honored system of law.

It is conceded that the alleged homicide was committed by the defendant, and he places his defence upon the ground that he was a regularly constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

This defence necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties.

Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers

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are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy.

Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." (Foster, 308.) If an officer is killed while performing his duty, the law deems such killing murder of *malice prepense*.

This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty, is an indictable offence at common law, and the punishment is regulated by the nature of the offence.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle, that when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and

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if the resisting party is killed in the struggle the homicide is justifiable. (*Garrett's Case*, N. C. R., 144, Winston.)

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then if the said defendant is killed the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. (2 Wharton, Crim. Law, 1030-31, and authorities referred to in note.) If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant. The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. (*State v. Bryant*, 65, 327; *State v. Garrett's Case*, Winston, 144.)

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, *if he resists*; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of pre-

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caution. A defendant is bound to submit to a known officer ; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained ; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. (1 Wharton, Cr. L., Secs. 1289, 2925 ; *Cooley's Case*, 6 Gray, Mass., 350.)

One who is not a known officer ought to show his warrant and read it, if required ; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser *ab initio*, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. (*Garrett's Case*, *supra*.)

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in wilfully shooting him down ; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. (*Forster's Case*, 1 L. C. C., 187.)

The rule is different in cases of felony. (*Bryan's Case*, *supra*.)

If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the

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protection of the law ; but it would seem that if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice.

I have stated to you many points of law which do not directly arise in the case before us ; but it is important that they should be known and well understood in the country, where, in recent years, so much violence has been committed—*violence in the name of law and violence in defiance of law.*

The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court.

In performing this important and solemn duty there are three points worthy of your special inquiry:

1st. Whether the prisoner on trial was a known officer of the law and had in his hands, at the time of the homicide, legal process authorizing and commanding him to arrest the deceased.

2d. Whether deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted.

3d. Whether the resistance, if made, had entirely ceased, and the deceased had yielded himself quietly and willingly into the custody of the officer, and no longer had any purpose of resistance.

Upon the first point I will state, as a conclusion of law, that it is the duty of a court to recognize its regular officers and process. I therefore instruct you that the defendant was a regularly constituted officer of this court and the process under which he professed to act was due process of law. The only questions left for you to determine on this point are, Did the prisoner have such process in his hands at the time of the homicide? Was he endeavoring to execute such process? Was he a *known officer* of the law? And did the deceased have good reason to believe that there was an indictment against him which made him amenable to legal process?

The second and third points presented involve questions of

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fact which you must ascertain and determine from the testimony in the case. To aid you in the performance of this duty, I will now, in obedience to the requirements of the law, proceed to recapitulate the testimony, and will carefully endeavor not to express an opinion on the subject. I solemnly warn you not to allow your verdict upon questions of fact to be influenced by any impressions that you may form as to the conclusions of my mind. You must form your opinions upon questions of fact from the testimony, and allow no prejudice or outside influence to control your action.

* * * * *

From this recapitulation and your own recollection you will perceive that the testimony is very conflicting. It is your duty carefully to consider the whole testimony and reconcile, as far as you can, any apparent conflicts; and when this cannot be done, you must believe that which you think, under all the circumstances, is entitled to the most credit. If, upon any question, you have a reasonable doubt as to the truth of the matter, you must render this doubt in favor of the defendant. This is the humane rule of the law in all criminal trials, but it is specially important and imperative in trials for capital felonies.

There are some circumstances connected with this case which I feel it to be my duty to call to your special attention, in order that they may not have an improper influence upon your action. The revenue laws have been the subject of much exciting discussion. Some persons advocate their rigorous enforcement, while others denounce such laws as unjust, inexpedient, and oppressive. All persons engaged in the execution of these laws have their warm friends and bitter opponents. No such influences should enter into and control your deliberations. A citizen on trial for crime is entitled to be confronted in court by his accusers and have them solemnly sworn to tell the truth. He is also entitled to be tried by a *jury of his peers*, who are free from all prejudices, and who in their action will have an eye single to justice and truth. These rights are as old as the common law; they constitute fundamental principles of English and American freedom, and have been secured in the Federal and all State constitutions. They extend to all trials for crime, but

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they ought to be especially regarded as sacred and inviolable where human life is put in jeopardy.

You, gentlemen of the jury, acting under the solemn obligations of your oath, and as fair-minded and impartial men, should discard all opinions and prejudices which you may have formed for or against the defendant, and try him as all citizens charged with crime ought to be tried—*according to the law and the testimony.*

Gentlemen of the jury, if you come to the conclusion, after weighing all the testimony, that the deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted, then you will find the defendant not guilty.

2d. If you find that resistance was made but had entirely ceased and the deceased had yielded himself quietly and completely into the custody of the officer, and no longer had any purpose of resistance, then the prisoner is guilty of manslaughter; and if sufficient time had elapsed for the prisoner to get over the excitement caused by the resistance, then he is guilty of murder.

If you have any reasonable doubts upon these questions, then the defendant is entitled to the benefit of these doubts.

The jury, after a retirement of two hours, found a verdict of "not guilty."

*United States Circuit Court, Eastern District of Virginia,
at Richmond, April, 1876.*

THOMAS E. JENKINS v. BOARD OF SUPERVISORS OF CULPEPER
COUNTY.

Where the Board of Supervisors of a county charged by law with the duty of levying a special tax for the payment of the bonds and interest coupons issued for the erection of county buildings, had been negligent and inefficient in discharging their duty, a United States court will issue

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the writ of *mandamus* in favor of non-resident holders of overdue coupons, in favor of whom judgment had been recovered in the United States court, to compel the efficient performance of their duty.

MR. JOHN HOWARD moved the court for an absolute *mandamus* in the case of *Thomas E. Jenkins, of Baltimore, v. The Board of Supervisors of the County of Culpeper*. He read the petition of Mr. Jenkins filed on the 12th of October, 1875, setting forth that under an act of the General Assembly of December, 1870, the county of Culpeper had issued bonds to the amount of fifteen thousand dollars, with interest coupons thereto attached, payable semi-annually, for the purpose of erecting a court-house and other public buildings in the county; that the bonds had been accordingly issued, and that several instalments of coupons, of which Mr. Jenkins was the holder, had fallen due and had been dishonored; that by the said act of Assembly the Board of Supervisors were authorized to levy a special tax for the payment of the bonds and interest-coupons, and that the faith of the county was pledged to the payment thereof; that the board failed to perform their duty under the law; that Jenkins had accordingly brought suit in the United States Circuit Court upon the overdue coupons, and had obtained judgment thereon, upon which execution had been issued, and returned "no effects," and praying the court for a rule or *mandamus nisi* against the Board of Supervisors, requiring them to show cause why an absolute *mandamus* should not issue, commanding them to pay the judgment and execution immediately, or in default thereof to levy a special tax, under the direction and supervision of the court, for that purpose. And it was shown that the rule had been accordingly issued and been duly served upon the board.

Mr. C. U. Williams appeared for the county of Culpeper, and filed the answer of the Board of Supervisors. The answer stated that the board had in December, 1874, passed an order levying a special tax for the purpose of paying the interest-coupons and of creating a sinking fund for the payment of the bonds themselves when they should become due; that the board had also passed orders directing the treasurer of the county to pay the coupons which had fallen due, and that no interest should be al-

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lowed on the coupons after their maturity. The Board of Supervisors thus claimed that they had done their whole duty in the matter, and their counsel contended that nothing further could be required of them.

Mr. Howard read the statutes, showing the jurisdiction of the Board of Supervisors under the law, and held that under all the circumstances of the case the board had been negligent of their duty, and had not properly exercised the powers with which they were clothed for a timely and effectual levy of taxes for the payment of the debt; that four semi-annual instalments of coupons had fallen due and not a dollar had been paid, and that it was the legal duty and business of the Board of Supervisors not merely to have levied a special tax, but to have levied it in time to meet the coupons, and to have seen that the special provision made for the payment of the coupons was fully carried out, and if necessary to levy other taxes for the purpose, and that it did not appear they had done so, and that upon the whole there had been a failure of duty on the part of the board and of the county, and that the court ought to issue an absolute *mandamus* commanding the Board of Supervisors to pay, or cause to be paid, the judgment and execution which had been recovered and issued against the county, principal, interest, and costs, and also the costs of the proceedings for *mandamus*.

The court (Bond, Ct. Judge) entered an order awarding an imperative *mandamus* against the Board of Supervisors, commanding them, on or before the 1st day of February next, to pay, or cause to be paid, to Mr. Jenkins the amount of his judgment and execution, and costs, and the costs of the *mandamus* proceedings.

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District of South Carolina, at Columbia, November, 1876.

THE CASE OF THE ELECTORAL COLLEGE OF SOUTH CAROLINA.

It is competent for a Federal court to issue the writ of *habeas corpus*, in favor of petitioners imprisoned for contempt by a State court, where the acts of alleged contempt were committed in the performance of duties created by the Constitution and laws of the United States, and the petitioners were acting under the protection of the laws and the courts of the United States.

Where it clearly appears from the record that the State court exceeded its powers in committing such petitioners, it is competent for a Federal court to release and discharge them from imprisonment.

THE petition was as follows :

To the Honorable Hugh L. Bond, Circuit Judge of the Circuit Court of the United States, in and for the said Circuit and District.

The humble petition of H. E. Hayne, Thomas C. Dunn, Francis L. Cardozo, William Stone and Henry W. Purvis, respectfully shows :

That your petitioners, Henry E. Hayne, as Secretary of State, of the State of South Carolina, Thomas C. Dunn, as Comptroller-General of said State, Francis L. Cardozo, as State Treasurer of said State, William Stone, as Attorney-General of said State, and Henry W. Purvis, as Adjutant and Inspector-General, were, by the laws of the said State, constituted the Board of State Canvassers and authorized and required to canvass the returns and other evidences of election for each general election occurring in said State, and among other things to make a statement of the whole number of votes given at such election for the various officers voted for, upon the certified copies of the statements of the Boards of County Canvassers, and to certify such statements to be correct; and to certify their determinations to the Secretary of State, and further, to determine and declare

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what persons have been by the greatest number of votes duly elected to such offices, with power and duty to decide all cases under protest and contest, when the power to do so does not by the Constitution reside in some other body.

That the Secretary of State, upon receiving such certificate of the determinations of the Board of State Canvassers, is required to transmit a copy thereof under seal to each person thereby declared to be elected; and as to members of the Congress of the United States to prepare a general certificate under the seal of the State, addressed to the House of Representatives, of the due election of the persons chosen at such election as Representatives of said State according to such certified determination of said Board of State Canvassers; and as to the Electors of President and Vice-President of the United States, the Board of State Canvassers is required to make a statement of all the votes and determine and certify the persons elected in the same manner as provided for the election of other officers; and the Secretary of State is required to cause a copy of such certified determination of said Board to be delivered to each of the persons therein declared to be elected, and further to prepare three lists of the names of the Electors of President and Vice-President, and deliver them, with the signature of the Governor, and under the seal of the State, to the President of the College of Electors on or before the first Wednesday in December; and for a fuller and more specific statement of the duties and powers hereinbefore set forth, reference is now craved to the statutes of said State.

That the legislature of said State in conferring upon your petitioners the powers and duties hereinbefore set forth and referred to, acted in pursuance and solely by authority in respect to the election of members of Congress, of section 4 of Article I of the Constitution of the United States, and in respect to the election of President and Vice-President, of section 1 of Article II of the Constitution of the United States.

That in pursuance of the Constitution and laws of the United States, and of the said State, a general election for Electors of President and Vice-President of the United States, for members of the House of Representatives of the United States, for the various State and County officers, members of the General

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Assembly of said State, and for Circuit Solicitors of said State, was held on the 7th day of November, 1876.

That in pursuance of the powers and duties hereinbefore named, your petitioners assembled and organized, upon notification of the Secretary of State, on the 10th day of November, 1876, for the purpose of performing the duties imposed upon them by law as a Board of State Canvassers; that they adjourned from day to day, Sundays excepted, until the 22d day of November, 1876, on which day by the laws of said State defining their powers and duties, their powers to act as a Board of State Canvassers of said election ceased and determined by the express provisions of the twenty-seventh section of Chapter VIII of title ii of the General Statutes of said State, on which said day, your petitioners having fully, legally, fairly and honestly, according to the measure of their best skill and judgment, discharged and fulfilled their powers and duties as a Board of State Canvassers, did adjourn without day.

That in the lawful discharge of their duties as a Board of State Canvassers your petitioners duly canvassed, according to law, the returns of the election of Electors of President and Vice-President of the United States, and of members of the House of Representatives of the United States, and determined and certified that John Winsmith, Christopher C. Bowen, Timothy Hurley, Thomas B. Johnston, Wilson Cooke, W. B. Nash, and William F. Myers, were duly elected by the greatest number of votes as Electors of President and Vice-President of the United States, and that Joseph H. Rainey, Richard H. Cain, Robert Smalls, D. Wyatt Aiken, and John H. Evans were duly elected members of the House of Representatives of the United States.

That in canvassing the returns of said election for members of Congress and for electors of President and Vice-President, and determining, declaring, and certifying the result thereof, your petitioners were compelled to canvass and declare the election for all the State and other officers voted for at said election, except the Governor and Lieutenant-Governor, not only by reason of their duties as defined by the laws of said State, in respect to such State officers, but also by reason of the fact that the returns of all the persons voted for, and all other papers and evidences

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pertaining to said election and within the custody and jurisdiction of the Board of State Canvassers, covered and embraced the entire election, and were, therefore, necessarily blended and commingled as one general whole.

That if your petitioners had failed to discharge their duties in full on or before the said 22d day of November, 1876, the said election for Electors of President and Vice-President and members of Congress would have failed, inasmuch as by the laws of said State, no power is given to the Board of State Canvassers or to any other person or persons to canvass and determine said elections after said day.

That on the 13th day of November, 1876, after your petitioners had organized as the Board of State Canvassers, and while they were in discharge of their duties as such Board of State Canvassers, your petitioners were served with a notice, signed by James Conner, as counsel for certain relators in a proceeding in the Supreme Court of said State, wherein your petitioners were informed that motions would be made in said Supreme Court, on the 14th day of November, 1876, for writs of prohibition and mandamus against your petitioners; that, as subsequently appeared, the said proceeding in the said Supreme Court was intended to restrain your petitioners from acting in a judicial capacity as a Board of State Canvassers, or to inquire into any matter not appearing on the face of the returns of said election, and further to compel your petitioners to proceed to perform the merely ministerial duty of aggregating the returns of the several Boards of County Canvassers, and to certify the results thereof in accordance with the results of such aggregation; that your petitioners appeared in said Supreme Court, by their counsel, whereupon a rule of said court was made requiring your petitioners to show cause before said court why writs of prohibition and mandamus should not be issued against them in accordance with the prayers of said relators; that said court subsequently granted an order requiring your petitioners to proceed to aggregate the returns of the several Boards of County Canvassers, and to report the results to said court; that your petitioners thereupon proceeded to aggregate said returns of the Boards of County Canvassers and reported the results to said court, including the

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results of said returns as to the electors of President and Vice-President of the United States, and as to the members of the House of Representatives of the United States; that your petitioners, in regarding the order of said court, and in reporting the results of said canvass to the said court, acted in a spirit of courtesy to a high judicial tribunal, but then and now protesting and averring that the said court had no authority to issue said order, or otherwise to restrain or coerce your petitioners as a Board of State Canvassers, or to guide or direct them in the discharge of their duties; that your petitioners having, as hereinbefore stated, performed the duty required of them by the Supreme Court, and having, as hereinbefore stated, fully discharged all their duties in strict accordance with the Constitution and laws of the United States, and the constitution and laws of the said State, as a Board of State Canvassers, adjourned without day, whereupon, after said adjournment without day, your petitioners were served with an order of the said Supreme Court requiring them as a Board of State Canvassers to certify the elections, as senators and representatives in the General Assembly of said State, of all persons who appeared by the said report of your petitioners to the said court to be elected, and to deliver a certified statement thereof to the Secretary of State, and requiring your petitioner, Henry E. Hayne, as Secretary of State, to certify such statement of your petitioners to the said persons so to be declared elected; that your petitioners having already discharged all their duties as a Board of State Canvassers, and having at the time of the service of said order ceased to exist as a Board of State Canvassers, were and are wholly unable to perform any other or additional duties as a Board of State Canvassers; that your petitioners, failing to comply with the last-named order of the said court, for the reasons now set forth, the said court proceeded, at 1.30 P.M. of the 24th day of November, 1876, to issue its order requiring your petitioners to show cause to the said court why they should not be attached for contempt of the said court in failing to obey the said order of the court, and made the said rule returnable at 4 o'clock P.M. of the said 24th day of November; that at said hour your petitioners appeared by counsel and by affidavit informed the court that for want of time they were unable to

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make due answer to said rule, whereupon the court refused to grant your petitioners further time to answer, and adjudged them forthwith to be in contempt of said court, and on the 25th day of November, 1876, ordered that your petitioners do each pay a fine of \$1500, and that the sheriff of Richland County do take them into custody and confine them in the common jail of said county until they be discharged by the order of said court; that subsequently, on the 25th day of November, 1876, your petitioners were taken into custody by the sheriff of said county, and confined in the common jail of said county, where they are now, and each of them confined and restrained unlawfully and against right and justice of their liberty.

And your petitioners further show that a part of the proceeding hereinbefore referred to in the Supreme Court of said State consists of a petition for a writ of mandamus to compel your petitioners, as a Board of State Canvassers, to proceed to change the results determined and declared by them on or before the 22d day of November, 1876, while your petitioners were lawfully acting as such Board of Canvassers, as to the election of President and Vice-President of the United States, and to compare and correct said results by the returns of the managers of the several polls or precincts throughout the State, and otherwise still further to change said results as to said Electors; that in accordance with said petition for mandamus the said Supreme Court issued its rule to your petitioners, requiring them to show cause, on the 24th day of November, 1876, why a writ of mandamus should not issue in accordance with the prayer of said petition; that your petitioners made return to said rule that they were no longer capable of acting as a Board of Canvassers, whereupon the said court heard argument as to the sufficiency of said return, and, as your petitioners are advised and believe, the said court now have the said matter under consideration; that a part of said proceedings in said Supreme Court likewise consists in an application by the relators therein that the said court shall restrain and command, guide and direct your petitioners as a Board of State Canvassers in the discharge of their duties in determining, ascertaining, and declaring the results of the election of members of Congress voted for at said election; that, as ap-

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pears both by the order of commitment, and the reasons therein set forth under which your petitioners are now confined, and by other proceedings in said cause in the Supreme Court, the said court did, by its order, require your petitioners to make certified statements to said court of the persons who had received the highest number of votes for all the offices for which they were respectively candidates at the said general election held on the 7th day of November, 1876, including among said offices the offices of electors of President and Vice-President of the United States, and of members of the House of Representatives of the United States.

And your petitioners further show that the said proceedings in said Supreme Court, including all its said orders, were wholly without jurisdiction, and an interference with the legal powers and duties of your petitioners as a Board of State Canvassers in respect to said election for electors for President and Vice-President and members of the House of Representatives of the United States, which powers and duties, as hereinbefore stated, your petitioners were during said proceedings in said court executing under the laws of the said State, passed in pursuance of the authority conferred by the Constitution of the United States; that said proceedings, and especially said order committing your petitioners to jail, were and are an attempt by unlawful means to induce your petitioners as a Board of State Canvassers and as officers whose duty it was to ascertain, announce, and declare the result of the said election, wherein an election was held for members of the Congress of the United States, and whose duty it was to give and make certificates, documents, and evidence in relation thereto, to violate and refuse to comply with their duty and the laws regulating the same; that for this reason said proceedings and said order committing your petitioners to jail were and are in violation of section 5511 of the Revised Statutes of the United States.

Wherefore your petitioners, and each of them, show that they are in custody and confinement, and restrained of their liberty, for acts done in pursuance of laws of the United States, and that they are in custody in violation of the Constitution and laws of the United States.

Order and return.

Wherefore your petitioners humbly pray your honor to grant the writ of *habeas corpus* directed to Jesse E. Dent, Sheriff of Richland County, in whose custody your petitioners now are detained in jail as aforesaid, requiring him to produce the bodies of your petitioners before your honor, at such time as your honor may direct by said writ, to be disposed of as law and justice may require.

And your petitioners will ever pray, etc., etc.

An order for the issuing of the writ was made returnable immediately.

The writ was served by the marshal on the sheriff, which latter officer made the following return :

THE STATE OF SOUTH CAROLINA, }
RICHLAND COUNTY. }

I, Jesse E. Dent, sheriff of said county, do hereby certify and return to Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States,

That by virtue of a judgment an order issued out of the Supreme Court of the State of South Carolina, and signed by Hon. F. J. Moses, Chief Justice, the said H. E. Hayne, William Stone, F. L. Cardozo, T. C. Dunn, and H. W. Purvis were by me taken into custody and confined in the jail of said county on the 25th day of November, A.D. 1876, one of which said judgments and order is in words as follows :

"It is now adjudged that the said H. E. Hayne is in contempt of this court, and it is ordered that he do pay a fine of fifteen hundred dollars, and that the said sheriff of Richland County do take him, the said H. E. Hayne, into custody, and confine him in the common jail of said county until he be discharged by the order of this court."

And the same order was made in respect to each of the above-named persons, certified copies of which are herewith filed, and the bodies of the said Hayne, Stone, Cardozo, Dunn, and Purvis I have here, as commanded by this writ of 27th November, A.D. 1876.

Counsel for the petitioners made the following reply to the return of the sheriff :

Ex parte H. E. Hayne, Thomas C. Dunn, Francis L. Cardozo, William Stone, H. W. Purvis—United States Circuit Court.

Comes now the said petitioners and for reply to the return made by the said J. E. Dent, sheriff, etc., they say that they admit that the

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order set out in said answer was made by said Supreme Court, but they say the same was made in a certain cause wherein the State *ex relatione* R. M. Sims and others, as citizens and candidates, were petitioners, and these petitioners were defendants, and they now file and make part hereof a copy of the record and proceedings had in said court, and make the same a part hereof; and they say that the said Supreme Court had no jurisdiction, or authority, or jurisdiction of the subject-matter in said proceedings alleged or over your petitioners, and that, therefore, the said order of said court was and is void.

And they further say that, at the time the said order set out in the said answer was made, the said petitioners had completed their labors as a board of canvassers, and had adjourned and ceased to be a board, and, therefore, they were unable to comply with any order said court could or did make in the premises.

D. T. CORBIN,
THOMAS SETTLE,
J. C. DENNY,
For Petitioners.

BOND, C. J.—Upon the petition of several persons, styling themselves the Board of State Canvassers of South Carolina, which was presented to me on the first day of the regular term, I issued a writ of *habeas corpus* commanding the sheriff of Richland County, in whose county they were alleged to be, to produce the bodies of the petitioners before me, that I might inquire into the legality of their imprisonment.

This is a motion to dismiss the petition and remand the petitioners into the custody of the sheriff.

Section 755, title xiii, of the Revised Statutes U. S., provides that “the court or justice to whom application for the writ of *habeas corpus* is made shall forthwith award it unless it appears from the petition itself that the party is not entitled thereto.”

It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false.

They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a Federal court jurisdiction, the writ must issue, and the truth or falsity of the facts alleged must be determined at the hearing.

Whether or not, then, this writ issued properly or improperly depends upon the fact whether the petitioners have embraced in

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their petition what is necessary to give jurisdiction to the Federal courts.

To give such jurisdiction the party must allege that he is in custody in violation of the Constitution or of a law of the United States.

These petitioners do allege, in substance, that they were a Board of State Canvassers, charged with the duty, among others, of canvassing the votes recently cast at a general election, at which members of Congress and Presidential electors were to be chosen.

That they proceeded to canvass the votes cast, when, on the 13th day of November, 1876, while in discharge of their functions, they were informed an application had been made to restrain them from exercising what they thought to be their powers as a board of canvassers, charged as well with a Federal as State trust, and that in consequence of further proceedings against them, under said notice, they are now restrained of their liberty for acts done in pursuance of laws of the United States and are in custody in violation of the Constitution and laws of the United States.

When such a petition, including every requirement of the statutes was presented to me there was nothing to be done but to order the writ to issue.

But it is very plain that if these parties are in custody for disobedience of an order of a State court of competent jurisdiction, there is no power in the Federal courts to release them.

It is not to the point to show that the order of commitment is erroneous. It must be absolutely void. The judgment of a State court having jurisdiction of the person or thing in controversy must be respected by every other court. It cannot be reviewed except in the way pointed out by the statute.

The first question, then, to be decided at this time and upon this motion is whether or not the Supreme Court of the State of South Carolina had jurisdiction to hear and determine the matter before it.

Article I, section 26, of the Constitution of South Carolina, provides: "In the government of this Commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

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Section 4, of Article IV, of the same instrument, defines the power of the Supreme Court thus: "The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law under such regulations as the General Assembly may by law prescribe; *Provided*, The said court shall always have power to issue writs of injunction, *mandamus*, *quo warranto*, *habeas corpus*, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in the State."

The powers of the Board of State Canvassers, so far as this case is concerned, are defined by Chap. VIII, title ii, sections 24, 25, and 26, thus:

"SEC. 24. The board when thus formed shall, upon the certified copies of the statements made by the Board of County Canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct, and subscribe the same with their proper names.

"SEC. 25. They shall make and subscribe on the proper statement a certificate of their determination, and shall deliver the same to the Secretary of State.

"SEC. 26. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise, when the power to do so does not, by the Constitution, reside in some other body."

And the objection to the jurisdiction of the Supreme Court made by the petitioners is, that they are a part of the executive department of the government charged with the execution of a law of the State, and that they alone are authorized to canvass the votes, and that they are not subject in the exercise of their functions to the control of the judicial branch of the government.

The Supreme Court of the United States, in a very able opinion by Mr. Justice Miller, in the case of *Gaines v. Thompson*, 7 Wallace, 347, has clearly determined what the law is on this subject, and that is, "that if it appear that the act which the court

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is asked to compel the officer of the executive department of the government to do be purely ministerial, the court, having jurisdiction to issue the writ of *mandamus*, may compel the executive officer to perform his duty ; but, if the act required to be done by the executive officer be not merely ministerial, but discretionary, or one about which he is to exercise his judgment, a court cannot, by *mandamus*, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of official duty ; and the court further says that the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given them ;" and for this Mr. Justice Miller quotes the opinion of Chief Justice Taney, in the case of the *Commissioner of Patents v. Whitely*, 4 Wallace, 522, and the law is stated to the same effect in a very celebrated case in Maryland, by Mr. Chief Justice Bowie, *Miles v. Bradford*, 22 Md. Rep., 170, a case where the powers of the governor to canvass the votes was not so broadly given as in the case at bar.

That the duty of this board of canvassers was not merely ministerial, but that they were clothed with a large discretion, seems to me, is very plain. They were not merely to take the returns and aggregate them. They were to canvass them. That is, they were to examine, to sift, to scrutinize them, which implies a power to reject such as were not lawful in their judgment ; and more, they were to decide all cases under protest or contest that might arise when the power to do so did not, by the Constitution, reside in some other body.

They were the executive officers, appointed to declare the election of such persons as had, in their judgment, the majority of the legal votes cast. If they decided erroneously or falsely, the remedy of those candidates who thought themselves wronged was by *quo warranto*, but no court had the jurisdiction to compel the Board of State Canvassers to do otherwise than their own judgment dictated.

It remains now to be seen what the court was asked to do by the relators. Their suggestion sets forth : "That the board is pro-

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ceeding to hear and determine all matters of contest or protest before them in regard to the election of persons who were candidates at the general election, and is proceeding to certify their determination on such contests and protests to the Secretary of State." And they pray that a writ of *mandamus* may issue commanding them to ascertain from "the managers' returns and statements forwarded to them by the boards of county canvassers, the persons who, at the general election held on the said 7th day of November ult., had the highest number of votes; and commanding them and compelling them to revoke and annul any determination or decision which they may have made in any case of contest or protest, if any such there be."

Under the cases cited in the opinion of the Supreme Court of the United States, 7 Wallace, 347, *Gaines v. Thompson*, above referred to, I am of opinion that the Supreme Court of the State of South Carolina had no jurisdiction to entertain any such "suggestion" or petition.

But it does not follow because a party is in custody by reason of a void judgment of a State court that a Federal judge or court has jurisdiction to release him from his imprisonment.

He must be in custody in the language of the statute for an act done or omitted, in pursuance of a law of the United States, or in custody in violation of the Constitution of the United States, and the question therefore presents itself whether the Board of State Canvassers, in exercising their functions in reference to the late general election in the State at which members of Congress and electors of President and Vice-President were to be chosen, were acting in any respect in pursuance of an act of Congress or under the Constitution of the United States. That they were so acting is partly shown from the fact that Congress has undertaken by statute to punish these State officers for dereliction of duty. Section 5515 of the Revised Statutes of the United States provides, "that every officer of an election at which representatives or delegates in Congress are voted for, *whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority,*" who commits the acts forbidden by that section, shall be punished as

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therein provided. This was beyond the power of Congress unless these officers were acting in pursuance of a law or under or by virtue of the Constitution of the United States.

But that these petitioners, though appointed by the State, are under the protection of the courts of the United States, is apparent from the fact that the Board of State Canvassers have certain powers to perform the authority for the exercise of which is derived directly from the Constitution of the United States.

Section 1, Article II of the Constitution provides that electors shall be appointed in such manner as the legislature of each State may direct. When the legislature of a State, in obedience to that provision, has by law directed the manner of appointment of the electors, that law has its authority solely from the Constitution of the United States. It is a law passed in pursuance of the Constitution.

In South Carolina the legislature has passed such a law. It has provided that electors shall be chosen by the qualified voters of the State, and the power of the State canvassers to *canvass, determine and declare* the result of such election, and to hear all questions of protest and contest relative to said officers, is expressly given in the sections of the statute above quoted. Section 2, Article I, of the Constitution of the United States, provides that members of Congress shall be chosen by the people of the several States, and in South Carolina the mode of choosing them has been fixed by law, and the Board of State Canvassers are appointed the proper officers for determining and declaring the result of such election.

An examination of the laws of South Carolina will show "that State and county officers are elected on the same day that electors of President and Vice-President and Representatives to Congress are voted for, and that they are voted for on the same general ticket, and that all ballots at the several precincts in each county are deposited in the same box, and are counted and returned by the same set of election officers, and the result of such election is certified to the Board of State Canvassers by the officers holding the election."

And section 5514, title lxx, Revised Statutes of the United

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States, provides "that any one who is proved to have voted at such general election shall be deemed to have voted for Representatives in Congress."

The Board of State Canvassers is required to meet on the 10th day of November for the purpose of sifting, scrutinizing, not merely aggregating, the statements of the county boards. The validity of the entire election in a certain precinct or county depends upon a state of facts applicable to every officer, State or Federal, who has been voted for on the general ticket at that particular precinct. So far as the laws of the United States are concerned, at an election where members of Congress are to be chosen, any alleged intimidation or violence toward a voter, or other misdemeanor described in section 5511 of the Revised Statutes, would be a proper consideration for the board in determining the result; because such violations of the laws of the United States, if sufficient in degree in the judgment of the Board of State Canvassers, would control the result.

This is the law of South Carolina as applied concurrently with the paramount law of the land—the acts of Congress made in pursuance of the Constitution of the United States.

The Board of State Canvassers was not at liberty in canvassing the votes to shut its eyes to the laws of Congress respecting what was a fraudulent poll. In the petition the board alleges it was necessary, in canvassing the returns for Federal officers at this general election, when both State and Federal officers were voted for on the same ticket, to canvass all the votes polled and to declare the election of State officers after such canvass as well as Federal officers, and it is manifest that to determine a general election the amount of fraud and intimidation, if there was any exercised to control the vote for State officers, must have had some influence upon the election of Federal officers, and what the effect of it was upon such election, it was for the board to determine.

The return of the sheriff shows that he holds the petitioners under an order of the Supreme Court, in which it is alleged they are in contempt of that court for disobedience of an order passed in a certain cause.

This cause, by the papers filed, appears to be the case of the

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State at the relation of R. M. Sims and others against H. E. Hayne, chairman, and others, as members of the State Board of Canvassers.

We have shown from the "suggestion" itself that in our judgment the court had no jurisdiction to entertain it, and though the returns show that the parties are in custody to-day solely for not obeying the mandate of the court respecting State officers, it is our duty to go behind the returns and look at the case as it presented itself to the Supreme Court at its inception. *United States ex rel. Hendricks v. Harris; Ex parte Dock Bridges*, 2 Circuit Court L. I., 327; 21 Int. Rev. Rec., 214.

What the relators asked the court to do in their original suggestion is perfectly plain, and we have above quoted the paragraphs of the "suggestion" which constituted the ground of complaint of the relators. In my judgment, the whole matter was beyond the jurisdiction of the Supreme Court, and any order passed by them upon such "suggestion" is void.

A commitment for contempt is like any other judgment in a criminal case. While it gives me great concern to hear and determine a cause where parties are charged with disobedience to the orders of a State court, yet where the liberty of men is concerned, who have a right to appeal, under the act of Congress, to the Federal courts, I am sure my brother judges of the State courts will not think me wanting in courtesy if I hear them, as I am bound by law to do, and will believe me when I say there is no one who regrets more than myself this conflict of jurisdiction.

I think this proceeding in the Supreme Court was beyond the jurisdiction of that court. That the State Board of Canvassers were clothed, under the law, with discretionary powers, which required them to discriminate the votes, to determine and certify the candidates elected after scrutiny, and that they were a part of the executive department of the government, and were in no wise subject to the control, as to what they should do after they had commenced to perform that duty, of the judicial department; and that as this was a general election, at which members of Congress were to be elected, and electors of President and Vice-President of the United States to be chosen, they were acting in a Federal capacity,

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or, in other words, in pursuance of a law of the United States, and, therefore, if any one disturbs them in the exercise of their functions, they are entitled to the protection of the courts of the United States.

And while I greatly regret to differ from my brethren of the State court, I shall make an order discharging the parties from custody.

I am happy, however, to think that this controversy may be referred to a tribunal whose judgment we all respect,—the Supreme Court of the United States; and I shall be displeased as little as any one to hear that in this judgment I have been in error.

In the course of the preparation of these notes I have had to refer to the following authorities :

Ex parte H. E. Hayne et al.—Petition for Habeas Corpus.

AUTHORITIES.

The Circuit Court can look behind the return of the officer and the commitment and examine into the cause of the detention. Rev. Stat. U. S., section 753; *U. S. ex rel. Hendricks v. J. O. Harris*, Atlanta Whig, June 13th, 1872; *Ex parte Dock Bridges*, 2 C. L. I., 327; Opinion of Bradley, J., in same case, 21 Int. Rev. Record, 214; *Ex parte Jenkins*, 2 Wallace, Jr., 521; *Ex parte Mattison*, Manuscript; Opinion of Bond, J., U. S. Circuit Court, Dist. of S. C.; *Bigelow v. Forrest*, 9 Wallace, 339; *Ex parte Lange*, 18 Wallace, 163; *People v. Liscomb*, 60 N. Y., 573.

The Supreme Court had no jurisdiction to control, by mandamus, the action of the Board of State Canvassers in matters within their discretion. Const. of S. C., Art. IV, sec. 4. Const. of S. C., Art. I, sections 26 and 33; Gen'l Stat. of S. C., chap. 8; *Astrom v. Hammond*, 3 McL., 107; *Elliott v. Piersol*, 1 Pet., 328; *People ex rel. Tweed v. Liscomb*, 60 N. Y., 560; *Gaines v. Thompson*, 7 Wallace, 347; *Secretary v. McGanahan* 9 Wallace, 298; *Mississippi v. Johnson*, 4 Wallace, 475; *Att'y-Gen'l v. Bartow*, 4 Wis., 567; *Stats of Ohio ex rel. Grissel v. Marlow* 15 Ohio, 114; *Rice v. Austin*, 19 Minn., 103. See, as to Executive Officers in S. C., Gen'l St., chap. 16, sec. 1.

Mandamus will not lie where there is any other remedy. *People v. Cover*, 50 Ill., 100; *Bassett v. School Directors*, 9 La., 513.

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Board could not reassemble after adjournment sine die. Cooley, Const. Lim., 622; *Clark v. Buchanan*, 2 Minn., 346; 33 N. Y., 603.

Board cannot be punished for disobedience to a void order. *Walton v. Deneling*, 61 Ills., 201; *Dickey v. Reed et al.*, Supreme Court of Illinois, not yet reported; *Ex parte Grace*, 12 Iowa, 207. Board was acting under Constitution and laws of the U. S., Const. U. S., Art. I, sec. 2; Const. U. S., Art. II, sec. 1; Rev. St. U. S., sections 5510 and 5511; Hurd on Habeas Corpus, 412; *Ex parte Kearney*, 7 Wheat., 38; *New Orleans v. Steamship Co.*, 20 Wallace, 392; *U. S. v. Johnson*, 3 McLean, 96; *Norris v. Newson*, 5 McLean, 100; *Tarble's case*, 13 Wallace, 407; *Alleman v. Booth*, 21 How., 523; *Ex parte Cabrera*, 1 Wash. C. C., 237; *Ex parte Watkins*, 3 Peters, 201.

United States District Court, Eastern District of Virginia, at Norfolk, January 16th, 1877.

EX PARTE JOHN W. TATEM.

The courts of the United States have, by section 711 of the Revised Statutes of the United States, jurisdiction exclusive of the State courts of crimes committed in the Gosport Navy Yard in Virginia.

By navy yard is meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float vessels of the navy while at the navy yard.

An arrest by the State authorities of a person accused of a crime committed in one of the places mentioned in section 711 is a violation of a law of the United States in contemplation of section 753; that is to say, is a violation of section 711, and a United States court may issue the writ of *habeas corpus* for a person so arrested by State authorities, and in jail under such arrest.

ON habeas corpus.

This case was heard before Judge R. W. Hughes, on Monday, the 15th instant, at the United States court-room, at Norfolk. The prisoner was represented by William H. C. Ellis, Esq., and Mr. David J. Godwin, Commonwealth's attorney,

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appeared in behalf of the Portsmouth authorities. The legal points raised and discussed by the respective counsel, as well as the facts disclosed on the examination of witnesses, are covered by the opinion of the judge.

HUGHES, J.—A prosecution is pending in this court by the United States against John W. Tatem, charged with shooting and killing one Michael Joyce on board the United States steamer Canandaigua, on the night of January 1st, 1877. The ship was lying at the wharf of the United States, in the navy yard of the United States at Gosport, which is situated near the city of Portsmouth, in the county of Norfolk. By an act of Assembly of January 25th, 1800, and deeds made in pursuance thereof, and by subsequent acts and deeds (see acts 1846-7, chap. 12, pp. 14 and 15, and of 1833, chap. 33, p. 25), the Commonwealth of Virginia ceded to the United States the territory and all the jurisdiction which the Commonwealth possessed, over the public lands known by the name of Gosport, and certain lands immediately opposite, for the purpose of a navy yard. By navy yard is meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the navy yard. The land ceded lies on both sides of the water at Gosport. By section 5431 of the Revised Statutes of the United States it is enacted that every person who unlawfully and wilfully, but without malice, shoots and kills another within any fort, arsenal, dockyard, magazine or place or country under the exclusive jurisdiction of the United States, shall be guilty of manslaughter and punished by fine and imprisonment (as prescribed by section 5343).

Section 711 of the Revised Statutes enacts that the jurisdiction vested in the courts of the United States over crimes and offences cognizable under the laws of the United States shall be exclusive of that of the courts of the several States.

The death of the deceased occurred on the premises of the United States, where he was taken immediately after the shooting.

Complaint of the killing was promptly made before United

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States Commissioner Barry, and, after an examination of witnesses, the accused was allowed to give bail in the sum of \$1000 for his appearance at the next grand jury term of this court.

Subsequently to his release, upon recognizance, he was arrested upon a charge of murder under a warrant of the mayor of Portsmouth, and committed to the jail of Portsmouth upon a mittimus which contained an indorsement authorizing the prisoner's discharge, upon giving bail in the sum of \$1000. And it appears in evidence that this commitment by the mayor of Portsmouth was for the same act of killing and shooting the deceased, Michael Joyce, on board the ship *Canandaigua*, lying at the wharf of the Gosport Navy Yard, for which he is under prosecution by the United States.

The prisoner being therefore under two prosecutions for the same act, filed his petition before me on the 13th instant, reciting the facts and praying for a writ of *habeas corpus* requiring the jailer of Portsmouth to produce his body before this court to-day; and the prisoner is now here in custody of the sergeant of Portsmouth.

The act complained of having been committed within a place, all jurisdiction within which has been ceded by Virginia; and the United States courts having exclusive jurisdiction of the offence committed therein, any prosecution for the same act in a State court is in violation of section 711 of the Revised Statutes, giving the United States courts jurisdiction exclusive of the State courts.

And section 753 of these Revised Statutes authorizes the issuing of the writ of *habeas corpus* by the United States court in any case of a violation of the Constitution, or a law, or a treaty of the United States, where the prisoner is in jail, under whatever authority.

Nothing could be more scandalous or barbarous than a contest between two courts for the jurisdiction of a criminal prosecution involving the character, liberty, and property of an accused person. Any court of proper sentiments so far from seeking to secure such jurisdiction would rather avoid it if that could legally be done. In the present case there can be no doubt that the jurisdiction is in the United States. It is there by ex-

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press cession from the Commonwealth of Virginia; it is exclusively there by the statutes and Constitution of the United States. In addition to these considerations, the cognizance of this particular offence had already been taken, and a prosecution instituted by the United States before the State authorities had taken possession of the prisoner; and, therefore, I do not perceive how this court could abrogate its powers and duties in this case. If this court had concurrent jurisdiction with the State authorities, I should at once send this case to those authorities for prosecution. The courts of the United States prefer to take that course in all cases of concurrent jurisdiction. Not long ago the Circuit Court for this district tried an indictment for murder on board a ship lying in or near Hampton Roads. There was a verdict of guilty. But some doubt arose whether the vessel was lying within the body of a county—that is to say, within the *fauces terræ* of one of the counties contiguous to the Roads. On this point there was no evidence. On account of this doubt the United States court refused to enter judgment or pronounce sentence upon the prisoners, who had been thus committed.

So here, if there were any room for doubt that the act complained of had been committed within the limits of the jurisdiction ceded by Virginia to the United States, and in which the jurisdiction of the courts of the United States is made by an express law exclusive, I would remand the prisoner with alacrity to the authorities of Virginia. The facts concerning the jurisdiction, however, being positive, all doubt is removed, and I am concluded in my action. See *United States v. Cornell*, 2 Mason, 60; *United States v. Ames*, 1 Woodbury and Mason, 76, and cases cited therein.

I should have preferred that this writ had been asked of a superior court of the State; but as the petition has been presented here, I have entertained it as a matter of duty.

The prisoner must be discharged.

United States Circuit Court; before the Circuit Judge at Baltimore, Maryland, February, 1877.

IN THE MATTER OF JOHN ENGLE, ALEXANDER S. ROSS, JOHN G. STITCHER, GEORGE HOBBS, AND HENRY HAMPE.

The act of Congress of the 28th of February, 1871, as amended and embodied in title 26 of the Revised Statutes of the United States, more particularly sections 2021 and 2022, is constitutional, being authorized by section 4 of Article I of the National Constitution; and special deputy marshals of the United States will be protected by the Federal courts in discharging their duty under those sections of the Revised Statutes.

Such deputy marshals are clothed with discretion in the exercise of their duties under those sections.

ON petitions for writs of habeas corpus.

BOND, Ct. J.—The facts in these cases important to their decision are within a very narrow compass. The statements made by the petitioners differ little from the statements made by the respondents respecting them. The petitioners were appointed special deputy marshals at the late election for Representatives in Congress, under section 2021, title 26, Revised Statutes of the United States. While in the performance of their duties as such deputies at the fourth precinct of the twentieth ward, in the city of Baltimore, they arrested two persons and took one of them before a United States commissioner, where he was immediately discharged on bail and returned to the poll. The other person arrested was taken to the chief marshal of the ward, where he was by him released. There was no unnecessary violence or, indeed, any rough usage whatever used in making these arrests. If guilty at all, the special deputy marshals are guilty of a mere technical assault and battery. The one party arrested was charged with conduct at the poll tending to a breach of the peace, being intoxicated and noisy. The other was arrested for holding tickets having the heads of President Grant or the late President Lincoln thereon, which he was offering to approaching voters—these tickets having the name of the nominee

of the Democratic party for Congress printed on them, while the cuts indicated that they were Republican tickets. This was conceived to be an attempt to deceive the colored men there offering to poll, of which class of voters there was a large number in that ward who could not read.

The special deputy marshals were charged with assault and battery by the parties whom they had arrested, before the proper State officers. Warrants were issued for them and, having been taken into custody, they filed petitions for writs of habeas corpus. These writs were issued, and the special deputy marshals were discharged on bail by the judge of the Circuit Court of the United States. The grand jury of the Criminal Court of Baltimore City subsequently indicted them for assault and battery and for intimidating voters, and being again arrested they were again released on habeas corpus on bail. The act for which the petitioners were first arrested and subsequently indicted, it was proved at the hearing and admitted in the argument, were simply the arrests made by them at the polls of the Congressional election, while acting as deputy marshals as above stated.

This is a motion to quash the writs of habeas corpus so issued. Under this state of facts two questions arise which have been elaborately and well argued by the State's attorney of Baltimore City on the part of the respondents, and by the district attorney on the part of the petitioners. The first is, Are the acts of the 28th of February, 1871, and the amendments now contained in sections embraced under title 26 of the Revised Statutes, constitutional; and, more particularly, was it within the power of Congress to enact section 2021 of the Revised Statutes, which provides for the appointment of special deputy marshals, to attend the election of Representatives and delegates in Congress; and section 2022, which defines the duties of such deputies, requiring them, among other things, to keep the peace and preserve order at the polls? And the second question is, Supposing these questions to be constitutional, were the deputy marshals justified in arresting these parties for the causes above noted? Section four of the first article of the Constitution of the United States provides that "the time, places, and manner of holding elections for Senators and Representatives shall be prescribed in

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each State by the legislature thereof, but the Congress may, at any time by law, make or alter such regulations, except as to the places of choosing Senators." Under this section of the Constitution, the legislatures of the States for a long time proceeded by law to determine the time, places, and manner of choosing the Representatives in Congress, but by the act of the 3d of February, 1872, Congress, in the exercise of its authority under this fourth section, provided by law the time of holding the election of Representatives throughout the United States. The State legislatures had likewise provided the time and manner for the election of Senators until Congress, in the exercise of the same power, by the act of July 25th, 1866, determined by law the time and manner of the election of Senators of the United States.

It will not, we suppose, be disputed that the clause of the Constitution which in the same words grants power to two distinct bodies, must grant the same power to each, and that if, under section four of Article I of the Constitution of the United States above quoted, State legislatures have from the foundation of the government, and without objection, provided the judges and inspectors of elections for Federal officers, and have determined that the vote shall be *viva voce* or by ballot, as they thought best, that the Congress of the United States, under the same clause, may do the same thing. The Constitution provides that there shall be a House of Representatives, and further, that Congress may regulate the manner of the election of the members of it. An election, within the meaning of the Constitution, is the result of the free expression of the choice of the electors at the time and place appointed by law, and the declaration of the result by those appointed for the purpose. The manner of an election is nothing more nor less than the mode of effecting this purpose. This includes the power to appoint the persons to hold it; for if the election is determined by law to be by ballot, they must be duly authorized to receive the vote. If it be *viva voce* there must be some one to record the names of those whom the electors announce as their choice. There must be some one to count the votes, else the choice of the electors could never be ascertained. The States prescribe the qualifications of the

electors. To receive the votes of such qualified voters only, and to provide that all such qualified persons who offer to vote do so, is to hold an election. The mode of effecting this result is the manner of the election, which the States have all along regulated, and do in many particulars now regulate, but which regulation, to some extent, Congress has itself undertaken to make and alter. But it is argued that even admitting the power of Congress to appoint, as the States have heretofore done, the officers to conduct a Congressional election, there is no power given to Congress to appoint peace officers to keep the peace upon the soil of the States. Yet section 2022 provides that these marshals and deputies shall keep the peace and preserve order at the polls.

To regulate the manner of an election is to provide the means by which each elector expresses his choice freely and without hindrance or obstruction. To say that the States may, under this provision of the fourth section, appoint judges of Federal elections, designate the place where they shall sit during the day of the election, and that they cannot remove obstructions which on that day prevent the electors from reaching them, would be strange, indeed. If the States can do so the Congress may, for the same powers by the Constitution are given to each, as to Congressional elections. As an election, as we have above said, is the declared expression of the choice of the qualified electors, it is quite as necessary that no one but qualified electors should, as that they should themselves be able to do so. Hence the regulations respecting registration are a part of the manner of the election, for they furnish a method by which those who hold the poll may discriminate between qualified and disqualified voters.

The extent of the power given to the Congress by this fourth section is readily seen from the reasons given for its adoption at the time of framing the Constitution. Alexander Hamilton, in No. 59 of the *Federalist*, gives as a reason for its adoption, "that every government ought to contain in itself the means of its own preservation." According to his view, whatever was necessary to be done to enable the qualified voters of a State to

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freely express their choice for a Representative in Congress, the Congress under the fourth section has a right to provide.

If, by any reason of hostility, the State determined to destroy the Federal government by preventing the election of Representatives in Congress, either by a law forbidding its citizens to vote for such Representatives, or by failing to regulate the time, place, and manner of such election, since the Federal government could not exist without a House of Representatives, the power was given to Congress to make and alter such time, place, and manner. The Federal government has as much right to exist since the adoption of the Constitution which created it as the State governments have; whatever the latter may do to secure a full and free expression of the choice of State electors for candidates for State officers, the United States may do in respect to Representatives in Congress. Whether the hindrance or obstruction to a free expression of the choice of qualified electors for Representatives in Congress comes from an open act of hostility of the State or from the neglect to provide such a manner of election as to guard against such hindrance and obstruction, or from organized bands of its inhabitants conspiring together for the purpose, or from the act of one evil-disposed person only, the Congress has the right, by virtue of the power given by this section, for the preservation of the national existence, which depends, as the life of all representative forms of government must, upon the freedom and purity of elections, to establish such regulations respecting the manner of conducting the election as will, in its judgment, prevent and remove them.

The marshal, therefore, and his special deputies were constitutionally charged with the duty of keeping the peace and of preserving order at the polls of this Congressional election, and the question which arises is, Were they justified, upon the facts, in arresting Anton Schlauch, who was charged with being intoxicated, turbulent, and noisy? We think the offence of Schlauch, even as stated by the deputy marshals, was but slight, but a large discretion must be given to an officer charged with the duty of keeping order at an election precinct. His duty is to prevent a disturbance as well as to suppress disorder after it has arisen, and as in this case the deputy used no harsh measures, and might

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well have supposed that the facts proved respecting the conduct of Schlauch would create a breach of the peace then, though at another time, at a place where there was less excitement, such conduct would have done no harm, and might have been passed over as the boisterous mirth of a jovial man excited by drink. yet the polling-place was not a proper place for its display, We are of opinion that the deputy was justified in his removal from the vicinity of the polling-place. The exercise of the elective franchise is not a frolic; it is the highest and most solemn duty of the citizen, and the deputy marshals appointed to keep the peace and preserve order at the time and place of its exercise will be sustained in preserving such a state of affairs at the polls as will enable the oldest, weakest, most infirm, or timid of the electors to perform that duty. But by section 2022 of the Revised Statutes, the marshal and his special deputies are not only charged with the duty of keeping the peace and preserving order, but they are to prevent fraudulent voting.

Harris, one of the parties arrested, was a colored man. He was holding tickets headed by the devices of the Republican ticket, with the names of the Democratic candidates imprinted on them, and offering them to the colored voters as they approached the poll. Many of the voters were colored men who could not read. They were guided in their knowledge of the ticket by the pictures upon them, and they were offered to them by one of their own color. To give an ignorant elector a ticket with this device was, if he desired to vote for the Republican and not the Democratic candidate, to deprive him of his vote and to put a vote in the box for the opposing candidate by fraud. The deputy, we think, was justified in removing this cheat from the vicinity of the polling-place, not only because he was directed to prevent fraudulent voting, but because had this trick been discovered by the opposing party, it might then have led to an attempt to take his tickets from him, and to a consequent breach of the peace.

We have come to the conclusion that the act of Congress under which these marshals and deputies were appointed is abundantly authorized by the fourth section of Article I of the Constitution of the United States, and that the conduct of the deputy

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marshals in the exercise of the powers conferred on them was both justifiable and discreet.

We shall refuse the motion to quash, and enter an order discharging the petitioners.

United States Circuit Court, Eastern District of Virginia, at Richmond, October 10th, 1874.

EX PARTE JAMES W. MCCREADY.*

The Virginia act of Assembly, section 22 of ch. 214, acts of 1874, prohibiting persons, other than citizens of Virginia, from taking or planting oysters in the waters of the Commonwealth, and subjecting offenders to forfeiture and indictment, fastens the disability of alienage upon non-residents, and places them on a different footing from residents in respect to the privileges denied, and is therefore unconstitutional.

A person indicted and imprisoned under this act of Assembly is deprived of his liberty in violation of the Constitution of the United States, and therefore if in prison under State prosecution, may be released on habeas corpus by a judge of a court of the United States, under the act of Congress of February 5th, 1867, section 753 Revised Statutes of the United States.

ON writ of habeas corpus.

BOND, J.—James W. McCready, a citizen of the State of Maryland, is held to answer in the County Court of Gloucester County, in this district, upon an indictment found by the grand jury of that county in the words following: (Here follows the indictment.) This indictment is founded upon section 22 of chapter 214 of the acts of Assembly, 1874, p. 243, entitled “An Act for the preservation of oysters, and to obtain revenue for the privilege of taking them within the waters of the Commonwealth,” which is as follows:

“If any person other than a citizen of this State shall take or catch oysters or other shellfish in any manner, or plant oysters in

* A part of this decision has been overruled by the United States Supreme Court in the case of *Tubb v. McCready*, to be reported in 4 Otto.

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the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit five hundred dollars, and the vessel, tackle, and appurtenances; and any non-resident shall be deemed to have violated this section who shall allow oysters purchased by him for sale, and laid out as purchased, to remain so laid down more than sixty days."

To obtain his release McCready has petitioned this court for the writ of habeas corpus, which was granted him, and he now claims his discharge because, as he alleges, his arrest is in violation of the Fourth Article of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

It is urged on the part of the attorney-general that the right to catch or plant oysters is neither a privilege nor an immunity within the meaning of the Constitution of the United States; and that even if it were, the petitioner must seek his redress in the State court, where, if this point be decided against him, he may have an appeal to the Supreme Court, and that this court has no jurisdiction on habeas corpus to release him. That to catch and plant oysters is the privilege of the citizens of the State of Virginia is manifest from the first section of chapter 214, which declares and provides: "All the beds of the bays, rivers, and creeks, and the shores of the sea within the jurisdiction of this Commonwealth, shall continue and remain the property of the Commonwealth, and may be *used as a common* by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters," etc. The State of Virginia, after declaring the beds of the bays and rivers her property, might have prohibited her citizens from taking and catching oysters, and it would not have been lawful so to do. When, having that property, she declares that all her people may take them under prescribed conditions, she grants them a right and the privilege of so doing.

That such was the understanding of the General Assembly is manifest from the title of the act which calls it a privilege, and from the caption of section 6, which determines what residents shall pay for the "privilege."

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From this privilege, common to all citizens of Virginia, all non-residents are excluded.

No provision is made for their payment of the tax demanded of the citizens of Virginia, nor of a higher rate. They are denied the privilege entirely.

In the case of *Paul v. Virginia* (8 Wallace, 168), in commenting on this clause of the Fourth Article of the Constitution of the United States, Mr. Justice Field says :

“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disability of alienage in other States.”

If this were the object of the clause, as it undoubtedly was, the act of Assembly of Virginia under consideration has an entirely different and contrary object, for it fastens the disability of alienage upon non-residents, and places them on a different footing entirely from the citizens of Virginia.

The act is manifestly *unconstitutional so far as it concerns non-residents* ; and it only remains to inquire whether or not the petitioner is entitled in this court to the writ of habeas corpus.

By the act approved February 5th, 1867, authority is given to the several courts and justices of the United States to grant writs of habeas corpus in all cases where any person is restrained of his liberty in violation of the Constitution of the United States. Having found that the act of Assembly of Virginia, by virtue of which the petitioner is detained in custody, is in violation of the clause of the Fourth Article above quoted, it remains only for the court to give him the benefit of the writ and to order his discharge ; which is accordingly done.

Statement of the case.

*United States District Court, Eastern District of Virginia, at
Richmond, February 4th, 1875.*

EX PARTE H. P. TOUCHMAN, A SAMPLE MERCHANT.

Where a prisoner, who is a non-resident of a State, is under arrest for an act which would subject a resident to prosecution, committed in violation of a law which in some of its provisions in regard to non-residents is in violation of the Constitution of the United States, he is not entitled to be released by a judge of a Federal court on habeas corpus.

A law may be unconstitutional in some of its provisions and not in others, and in its effect upon some classes of citizens and not upon others; and may be treated as to those provisions and classes as *pro tanto* unconstitutional, while enforced as to other of its provisions and its effect upon other classes of citizens.

ON habeas corpus.

*E. Y. Cannon, for this prisoner, and George D. Wise, for others
in like circumstances.*

*E. C. Cabell, for the Commonwealth of Virginia, and Alfred
Morton, for certain resident merchants.*

In the matter of H. P. Touchman, on habeas corpus, to the sergeant of the city of Richmond, brings the body of the prisoner into court and makes return that the prisoner is held in his custody as jailer, etc., under an indictment found by the grand jury of the Hustings Court, charging him with unlawfully selling and offering to sell goods, wares, and merchandise by card, sample, and other representation, without a license, according to law, so to do; and that he is detained for no other cause.

The prisoner in his petition complains that he is unlawfully detained and wrongfully restrained of his liberty by arrest and imprisonment under an act of the General Assembly of Virginia, approved 30th April, 1874, section 110, entitled "An Act for the assessment, levy, and collection of taxes." He alleges that he is a citizen and resident of the State of Pennsylvania, doing business as a merchant in the city of Philadelphia, and is entitled as such to the enjoyment of all the privileges and immunities in the State of Virginia which belong to the citizens thereof; and

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he complains that the aforesaid act of Assembly contravenes the second section of the Fourth Article of the Constitution of the United States in this, that it imposes a tax on citizens of the Union not residing in Virginia greater than it imposes on resident citizens of Virginia.

The judge remanded the prisoner to the custody of the sergeant of Richmond, deciding as follows :

HUGHES, J.—The prisoner in custody is charged with violating the 110th section of the act of Assembly, approved April 30th, 1874, entitled “An Act for the assessment, levy, and collection of taxes.” This law requires all sample merchants to take out a license to sell by sample, and to pay a tax of \$100. No residents but licensed merchants and manufacturers can take out a sample merchant’s license. Section 111 requires resident merchants and resident manufacturers, besides any other tax they may be required to pay, in order to sell by sample to take out a license and pay a tax of \$25. It allows licensed manufacturers and merchants to exhibit samples of their wares and goods anywhere in the State. It makes the license of a merchant good not only in the city or county where it is taken out, but also over the whole State. It declares the license taken out by sample merchants to be a personal privilege not transferable, which can be used only by the person taking it out. It allows resident merchants who are licensed to exhibit their wares or goods anywhere in the State by agents, but forbids them to employ as agents non-resident travellers or salesmen. It allows a non-resident to take out a resident merchant’s license.

A law may be unconstitutional in some of its provisions and not so in others. It may be constitutional in its effect upon some classes of citizens and not so upon others. A law may be treated as to such provisions and as to such classes as *pro tanto* unconstitutional, and upheld as to other provisions and classes. If a prisoner has violated a provision of law that is constitutional, he should not escape because another provision of the same law is unconstitutional.

I am free to express the opinion that the act of the Virginia Assembly under consideration is in two or three respects uncon-

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stitutional, under the ruling of the Supreme Court of the United States in the case of *Wood v. Maryland* (12 Wallace, 418).

1. If a manufacturer of another State were to exhibit samples of his wares in this, after having taken out a license to sell on sample under the 111th section of the act, which requires resident manufacturers, duly licensed as such, in order to be allowed to sell by sample, to take out a "sample merchant's license," on paying \$25, then, if he were arrested and imprisoned for so exhibiting his wares, it would be a question whether he might not be released on the ground that he was not allowed the same privilege as a non-resident manufacturer which was allowed the resident manufacturer.

2. So if a merchant of another State were to take out a license as a merchant here, both as a resident merchant and under section 111 paying the tax of \$25, and then were to exhibit his goods by sample; in that case, if he were imprisoned for exhibiting his samples, it would be a question whether he might not be released on the ground that the same privilege was not allowed to him, as a non-resident citizen, that was allowed to the resident merchant.

3. So, also, if a non-resident travelling agent of a licensed resident merchant were to be arrested for exhibiting samples of the goods of his employer, he might be released on the ground that he was denied the privilege of acting as agent which was given by this law to resident travelling agents.

But this prisoner is neither a non-resident manufacturer, nor a non-resident merchant licensed here as a sample merchant, nor a non-resident agent of a licensed resident merchant. He was not, therefore, in any way exercising a privilege as non-resident which could be exercised by a resident. He had not paid any tax or taken out any license. He had not secured the right in any of the modes prescribed by law to exhibit samples. He had acquired no right to exhibit samples by virtue of any similar right acquired by any resident, and the only privilege of which he has been deprived is that of disregarding every requirement of the law of which he complains.

While, therefore, it may be that this act of the Virginia Assembly (of 30th April, 1874) operates unconstitutionally in sev-

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eral classes of cases where non-residents are liable to be prosecuted and imprisoned under it, yet it does not operate unconstitutionally in the case of this prisoner.

I have felt constrained to lean, as far as I consistently could, to the support of the law of the State, and, by a strict construction of the decision of the Supreme Court on this question, to apply it only as far as its very terms and language require. It declared the statute of Maryland, as to the especial provisions it had under review immediately affecting the plaintiff in error, *pro tanto* void. By limiting its decision to those provisions which directly affected the rights of the plaintiff, it impliedly forbade the courts of the United States to go farther and to invalidate other provisions of State laws not affecting the immediate rights of the non-resident citizen actually before the court.

United States Circuit Court, at Richmond, May 20th, 1876.

EX PARTE RICHARD S. PARKS.

Where the indictment by its averments gave the United States District Court jurisdiction of the offence, and that court took jurisdiction, and the jury found the facts charged in the indictment, and the accused was sentenced by the District Court, and imprisoned,

Error in the proceedings cannot be reviewed by the United States Circuit Court upon habeas corpus, and the accused will be remanded to the custody of the marshal.

THE facts of this case are fully set forth in the decision of the judge, which was as follows :

BOND, J.—The writ of habeas corpus issued in this case was upon the petition of the prisoner, Richard S. Parks, alleging he was illegally detained by the marshal of the Western District of Virginia, commanding the marshal to produce the person of the petitioner, and to make return thereto of the cause of said Parks's capture and detention. The marshal has made return that the

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prisoner is in jail in Harrisonburg, Virginia, in his custody, by virtue of a *mittimus* of the District Court of the United States for the Western District of Virginia, which is in the words following. (Here follows copy of *mittimus*.)

The petitioner alleges, however, that the court had no jurisdiction to make such a commitment, because he was charged in the indictment mentioned therein with an offence which the District Court of the Western District had no jurisdiction to try, and that its judgment upon the verdict rendered upon the indictment is absolutely void.

The petitioner produces the record of the proceedings in the District Court in his case in support of his petition and in response to the marshal's return.

The indictment is drawn under section 5419 of the Revised Statutes, which provides that "every person who forges the signature of any judge, register, or other officer of any court of the United States, . . . for the purpose of authenticating any proceeding or document," shall be punished in the manner prescribed in that section.

The indictment has three counts. The first charges that Parks "did forge the signature of C. Douglas Gray, a register in bankruptcy for the Sixth Congressional District of Virginia, to a certain receipt, which said receipt is in the words and figures following, to wit:

"HARRISONBURG, July 30th, 1875.

"Received of J. D. Martin by R. S. Parks, his attorney, the application with necessary papers for adjudication in bankruptcy of said Martin; also, fifty dollars, amount of requisite deposit.

"C. DOUGLAS GRAY,
"Register.

"He, the said Richard S. Parks, having committed the forgery aforesaid, for the purpose of authenticating the commencement of proceedings in bankruptcy in the case of J. D. Martin, of Page County, in the State of Virginia."

The second count varies from the first in alleging the purpose to have been "the authenticating a proceeding, to wit, the filing of the petition of J. D. Martin in bankruptcy."

The third count sets out no intent or purpose.

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The indictment appears, therefore, to charge a crime in the words of the statute, which is uniformly held to be sufficient unless there be some ambiguity or technicality in the language of the statute which it is necessary to amplify or explain in order that the party charged may be certain of the offence with which he is charged. If it be an offence at common law, the indictment must set out the elements which constitute that offence.

It appears to me that this indictment, upon its face, charges a crime which the District Court had jurisdiction to try and determine. Whatever the facts may have been, the indictment, whether true or false, charges an offence which is prohibited by the statute.

It charges that he forged the signature of a register in bankruptcy, who is the officer of the District Court, and that he did it to authenticate a proceeding, which is all the statute requires.

But the petitioner alleges the paper set out in the indictment would not authenticate any proceeding, and that even if he had used the paper for the purpose set out in the indictment it would not have had that effect; and that in fact there were no proceedings in bankruptcy of J. D. Martin, and that he could have had no such purpose.

But these are facts to go to the jury to show the intent and purpose necessary to constitute the offence charged, and have nothing to do with the jurisdiction of the court. The jury has found the fact against the prisoner, and we are concluded by that verdict.

But supposing the fact to be that the statute requires that the paper to which the signature of the officer is forged must be a paper which by law he is required to make and sign in the discharge of his official duty, and that though this in fact is not such a paper, the District Court determined that it was, is this more than error in the court, and can a judge of the Circuit Court review the errors of the District Court on habeas corpus?

My opinion is that the indictment, by its language, gave the District Court jurisdiction which once having acquired, no error in its proceeding can be reviewed upon habeas corpus, and the party will be remanded to the custody of the marshal.

An order was entered accordingly by his honor, Judge Bond, directing "that the said R. S. Parks be remanded to the custody

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of the marshal for the Western District of Virginia ; and it being suggested to the court that the said petitioner desires to enter an appeal, or to make an application to the Supreme Court of the United States, or one of the justices of the same, for a writ of habeas corpus or other legal proceedings in behalf of said practitioner, the court orders and directs that the execution of the sentence in the said case of the *United States v. Richard S. Parks*, entered in the District Court of the United States for the Western District of Virginia, at Harrisonburg, Virginia, on the 4th day of May, 1876, be stayed for the period of forty days from this date, and that a copy of this order be sent to the marshal for the Western District of Virginia.

“And it is ordered that the marshal retain the said Richard S. Parks in his custody meantime, and that at the end of the forty days above specified, he execute the sentence of the District Court, unless otherwise directed.”

On similar petition to the United States Supreme Court the principles of this decision were affirmed. See *Ex parte Parks*, 3 Otto, 18. But the accused was pardoned by the President.

United States Circuit Court, Eastern District of Virginia, at Alexandria, September, 1877.

DAVID G. YUENGLING, JR., v. FOUNTAIN D. JOHNSON.

Since the passage of the Judiciary Act of June 22d, 1874, and the adoption of the Revised Statutes of the United States the provision of the Judiciary Act of 1793, requiring reasonable previous notice of a motion for a preliminary injunction to be given, stands repealed.

At the time of granting an order to show cause against a motion for a preliminary injunction, a United States court or judge may, under section 718 of the Revised Statutes, and in patent cases, under section 4921, grant an immediate restraining order to be in force until the decision of the motion, for the purpose of preventing irreparable injury to complainant.

In respect to interlocutory injunctions, United States courts and judges have a larger discretion in patent cases than in other cases, conferred by section 4921.

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In deciding upon applications for interlocutory injunctions in patent cases, the action of the Commissioner of Patents at Washington usually makes a *prima facie* case for or against granting them.

Where a patent is for a peculiar combination or arrangement of old devices, and not for a new device, the patentee is not entitled to insist upon mechanical equivalents.

ON bill of injunction to enjoin the infringement of a patent right.

Motion for a rule to show cause against a preliminary injunction was made on August 8th, 1877, in the Circuit Court at Norfolk; and also a motion *ex parte*, without notice, for an immediate restraining order. Exhibits were filed with the bill, consisting of the affidavits of experts, and extracts from the records of the Patent Office. The extracts showed that a patent had been refused by a primary examiner to the Moffet register for tallying drinks in bar-rooms, as interfering with Fountain's patent for an improvement in fare-registers, 188,349; and the extracts also showed that on the 5th August, a Board of Examiners of the Patent Office had, on appeal, affirmed the decision of the primary examiner. The affidavits showed that in the opinion of the affiants as experts the Moffet register did infringe the Fountain register. The bill showed that the right of Fountain's patent for the State of Virginia had been purchased by and duly assigned to Yuengling, the complainant. On the bill and exhibits the court gave an order requiring the defendant to show cause against the motion for a preliminary injunction at Alexandria, on the 4th September proximo, and also an immediate restraining order meantime against the making, using, or vending of the Moffet register.

On the power of the court to grant an immediate restraining order on *ex parte* motion without notice, the judge filed the following note in the record of the case, on the 3d September:

HUGHES, J.—On the 8th of August the complainant filed a bill of injunction in this court in term at Norfolk, and moved for a temporary injunction in accordance with the prayer of the bill, and for an immediate restraining order. He also filed sundry

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documents and affidavits, making out a *prima facie* case for an injunction. The object was to prevent one Fountain D. Johnson, manufacturer of a certain mechanical register called the Moffett register, from selling and delivering these instruments, it appearing that he was about to deliver a large number of them to the Auditor of Public Accounts of Virginia, to be distributed by him to retail liquor dealers throughout the State for use.

" The evidence filed with the bill showed that skilled officers of the patent bureau of the United States had officially decided this Moffett register to be an infringement of a patent, the exclusive right to use which was owned by the complainant for the State of Virginia; and it was plain, if this should prove true, that the State was about to embark, in a futile manner, with an improper instrument, upon a new plan of taxation devised by her legislature, to the injury of the rights of the complainant, and that this was likely to be done in a few days.

It being apparent to the court that in case the pretensions of the claimant were true, the injury and confusion resulting would be irreparable, and that the complainant might have no recourse except to the liberality of the legislature of the State, an order was entered by which :

1st. The defendant in the bill was required to show cause at Alexandria, on the 4th instant, why the motion for a temporary injunction should not be granted.

2d. Restraining the defendant and all others meantime from making, using, or vending the said Moffett register; and,

3d. Requiring the complainant to file a bond in the penalty of ten thousand dollars to answer any orders of this court against him in this cause.

The expediency of this order seemed obvious to the court; but it felt at first some doubt of its power to grant the temporary restraining order, except after reasonable previous notice served. Upon a critical examination of the condition of the law on the subject, however, this doubt was removed, as will appear from the following review of the legislation of Congress,—and the order was given.

Section *five* of the Judiciary Act of Congress of March 3d, 1793 (ch. 22 of acts of 1793, United States Statutes at Large, vol. 1,

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pages 334-5) concludes with the words: "Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same."

The greater portion of the provisions of this act of 1793 were incorporated into the Revised Statutes of June 22d, 1874, ch. 12; but the foregoing clause requiring reasonable previous notice to be given in all cases of injunction was left out, and therefore stands repealed by section 5596 of the Revised Statutes.*

Instead of this provision the *seventh* section of the Judiciary Act of June 1st, 1872 (ch. 255, vol. 17, page 197, United States Statutes at Large), was inserted, which is in these words:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security, in the discretion of the court or judge." This act had already been in force for two years before the enactment of the Revised Statutes, and had virtually not only repealed the clause quoted from the Judiciary Act of 1793, but also rendered subordinate to its own provisions that part of Rule 55 in equity requiring previous reasonable notice to be given of motions for injunction.

While the clause of the act of 1793 in question was in force there were many decisions of the Supreme and circuit courts of the United States enforcing it, and these rulings of the courts have gone into the digests and text-books in use by the bar. But when the law itself fell, of course these rulings of the courts and teachings of the text-books ceased to be of authority in contravention of the later law. But even before the passage of the Judiciary Act of June 1st, 1872, an act of Congress revising, digesting, and consolidating all the laws relating to patent rights was passed July 8th, 1870 (see United States Statutes at Large,

* The language of section 5596 is: "All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; etc., etc., etc."

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vol. 16, page 206), and a section enacted in it authorizing the courts of the United States to deal with *injunctions in patent cases in a special manner*. This section placed injunctions in patent cases on a different footing from other injunctions. In this particular class of cases the courts were released from the requirement to adhere strictly to the rules of practice prescribed by law or rule of court in general for the Federal courts sitting in equity, and the circuit courts were "vested with power upon bill in equity, filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of *any right secured by patent, on such terms as the court may deem reasonable*." Thus was authority given to grant injunctions in patent cases, not upon such limited terms as were at the time required by law or rules in equity to be observed in other cases by the circuit courts of the United States sitting in equity, either as to notice, security, or other requirement; but authority was given to grant them in patent cases on such terms as accorded with the course and principles of courts of equity in general, and as the particular court in which the motion was made "*might deem reasonable*." This law made injunctions in patent cases exceptional, and conferred on United States circuit courts an unrestricted discretion as to the terms of granting injunctions in them. This provision of the law of 1870 has been carried into the Revised Statutes, with slight literal modifications, and stands now the law of the land in the form of section 4921. Thus, in patent cases, where the emergency was urgent, the court might grant injunctions without reasonable previous notice, before the law of 1872.

The passage of the Judiciary Act of June 1st, 1872, has given this power in all cases, and now injunctions may be granted in any case deemed exigent by the court, without previous notice, whether it be a patent case or not. The terms of the law of 1872, section 718, are, that "*whenever* notice is given of a motion for an injunction," the court or judge, if irreparable injury or delay be likely to result from delay, may restrain temporarily until the motion can be heard. *Whenever* means *at whatever* time notice is given, and does not mean *after whatever* time. Simultaneously, therefore, with the time of giving the rule to

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show cause against the motion, the court may grant an order restraining the act threatened until the decision of the motion.

There is no doubt of the power under section 718 to instantly restrain in any urgent case. But even if that were not so as to injunctions in general, there is no possible doubt of the power under section 4921 to enjoin in patent cases without previous notice; a power which, however, should always be exercised with great caution.

The motion for a preliminary injunction was heard at Alexandria on the 4th of September, and was for three days quite elaborately argued by counsel.

Messrs. W. W. Crump, Daniel A. Grimsley, and James G. Field, Attorney-General of Virginia, for defendant.*

Mr. John B. Young and Messrs. Hill & Ellsworth, for the complainants.

The order to show cause had required the defendant to file his answer to the bill and sustaining affidavits by the 28th of August, which had been substantially done. On the first day of the argument, defendant's counsel produced in court a patent for the Moffet register just issued to Moffett & Deane by the Commissioner of Patents.

At the conclusion of the argument, the court rendered the following decision:

HUGHES, J.—Most of the questions which have been argued at bar will be more properly considered at the final hearing of this cause, and must be adjourned until that time.

The motion is now heard after three weeks' notice, on bill, answer, and affidavits. The court will consider now only such questions as necessarily bear upon the motion for a preliminary injunction. It must endeavor as far as practicable to avoid committing or concluding itself on every question which will arise at the final hearing upon evidence regularly taken. The question now to be determined is, whether the complainant is entitled

* Then recently appointed to succeed the late R. T. Daniel, deceased.

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to a preliminary injunction. As his right to the exclusive use of the Fountain patent in Virginia may be assumed as undeniable, the principal inquiry for the court is whether the Moffett register is an infringement of it.

Even that question is not now to be finally decided, and the court ought not and is not bound to commit itself finally upon it.

The fact of infringement is denied, and the point to be now determined is whether the fact is *prima facie* made to appear with such certainty as to justify the court in granting a preliminary injunction against the use of the instrument *pendente lite*. The *prima facie* aspect of the case has been reversed since the 8th of August, when the temporary restraining order was granted. Then the action of the Patent Bureau had been such as to make, in the opinion of the court, a *prima facie* case for the complainant. Now the case in that particular is changed. The action of the Patent Bureau is such as to make a *prima facie* case for the defendant; for the Commissioner of Patents, whose action is final in that bureau, has reversed the judgment of his inferior officers, and virtually pronounced that the Moffett register is not an infringement of the Fountain register, by issuing a patent to Moffett & Deane for their invention as new.

It is true that the issuing of patents is not conclusive upon the courts. Patents are subject to review by the courts. Suits in a very large proportion of patent cases are but means of appeal to the courts from the action of the Patent Office. Yet while this is so, that action must always carry great weight with the courts. It is always very strongly persuasive with them. Patents are the results generally of contests between accomplished experts, and after such contests of the matured judgment of officers selected and appointed by the President for their extraordinary competency and skill, I think it is hardly going too far to say, following Mr. Justice Grier, in *N. E. Car Company v. Dunbar*, 1 Fisher, that the action of the Patent Office is sufficient to make such a *prima facie* case as to justify the action of a court on almost any motion for a preliminary injunction.

If, indeed, in any case the general unanimous testimony of experts united in condemning the action of the Patent Office, in such case a court might well hesitate to treat that action as con-

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stituting a *prima facie* case for or against a preliminary injunction. But when, as in the present case, the weight of expert testimony is nearly evenly balanced, a court may safely presume that the action of the Patent Office, taken after a sharp contest between patent lawyers and experts, is *prima facie* correct.

On this ground alone I think I would be justified in refusing a preliminary injunction in the present case. But as a court is not at liberty to surrender itself to an unquestioning reliance upon the decision of another tribunal, when the duty and responsibility are upon itself to act upon its own convictions, I will state briefly the view of the facts of the case by which I am led to concur, for the present, in the judgment of the Commissioner of Patents.

The patent of Fountain is not for the invention of the mechanical devices used in making up his instrument, or of any of them. These are all old and in familiar use by the public. Fountain's patent is only for a particular combination and arrangement of these old and well-known devices in a manner to serve a particular purpose. Moffett & Deane's patent is of the same character. They employ old and well-known devices also; and their patent is for a particular arrangement and combination of these devices in a manner to serve a particular purpose other than that of the Fountain register. And it is a fact, obvious from an inspection of the two instruments, that the devices employed in one instrument are not identical with those employed in the other; and that the arrangement and combination of the respective devices made use of in each are different.

Fountain claims the invention of the worm meshing into a cogwheel to impart motion to the indexes. Moffett & Deane use no worm. The striking apparatus of the two instruments are different. Fountain has a single spring attached to the hammer, without any means of withdrawing the hammer instantly from the bell. Moffett & Deane have two springs, one to throw the hammer against the bell, and another to instantly withdraw it.

Moffett & Deane use a pinion to drive the registering apparatus; Fountain uses no pinion. Fountain's instrument is portable, and contrived especially for the purpose of registering fares

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taken on public conveyances; while Moffett & Deane's is intended to be stationary, and is contrived for the purpose of tallying drinks taken in a bar-room.

Fountain, in his specifications, claims that "his invention is an improvement in fare-registers," "adapted to be carried in the hand," consisting in an "arrangement and combination of parts whereby full and half fares are registered, and an alarm sounded as rapidly as collected by the conductors," having "on its face one dial and two separate hands."

In his specifications he speaks of his instrument as nothing more than a fare-register; and in alluding to devices for registering *hundreds, thousands, and ten thousands*, he expressly declares that these "form no part" of his instrument, thus indicating that his instrument was intended only for a fare-register. These latter devices are essential parts of Moffett & Deane's register.

Moffett & Deane's organization and combination of old devices is also for a special purpose, and that purpose one which was not contemplated by Fountain, and for which Fountain's contrivance could not be used conveniently without material alteration.

I think the doctrine of Mr. Justice Clifford and Judge Clarke in *Crompton v. The Bellnap Mills et al.*, 2 Fisher, is a sound one; that when the patent is for a peculiar combination of old devices the patentee cannot insist upon mechanical equivalents.

In general mechanics, the pinion may be the equivalent of the worm; but when one invention claimed is a combination of devices including the worm, another invention of a combination including the pinion differs from it in the very fact of using the pinion. It would be almost absurd to hold that a patent for a particular manner of using the worm would be infringed by a patent for a particular manner of using the pinion. We are taught at school that the lever, the windlass, and the pulley are all one and the same in the mechanical principle involved; yet a combination of several devices, of which a pulley should be one, might not, in fact, even remotely resemble a combination in which a lever or a windlass should be used. I think it is a just ruling of the courts that mechanical equivalents cannot be in-

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sisted upon in inventions which consist of the mere arrangement of old devices.

The same seems to me to be the case with regard to the *purpose* for which a combination is invented. The invention of a new device is in general patentable without reference to the *object* it is designed to accomplish, and is good against any subsequent invention of the same device designed for any other object.

But it seems to me that this is not necessarily the case where the invention is merely of a combination of old devices. In such inventions the *purpose* aimed at, the *form* of the structure, its *portableness* or non-portableness, whether it is used as a fixture or carried in the hand;—are elements which, though any one of them might not determine its character with reference to another invention of a combination of devices, yet all, together, might unite to constitute it a different instrument.

I repeat, however, that I do not wish to be considered as concluding myself or the court in its decision at the final hearing. It is sufficient for me to say that the complainant has not made a *prima facie* case so strongly in his favor as to warrant the court in awarding a preliminary injunction; and the motion is therefore denied. The order denying the motion will also dissolve the temporary restraining order which was granted on the 8th of August, and put the defendant under bond to account for the number of instruments manufactured by him and his receipts from their sale.

The bond of the defendant must also be given with reference to the great number of suits which complainant may be obliged to bring in the event of a decree in his favor at the final hearing.

In accordance with this opinion bond was required of the defendant in the penalty of \$20,000, conditioned as indicated.

The case was continued for final hearing at Richmond to the 17th day of October, during the fall term of the Circuit Court.

Statement and decision.

*United States Circuit Court, Eastern District of Virginia, at
Norfolk, June, 1877.*

EX PARTE SAMUEL T. TAYLOR.

Where a decree operating as a lien upon defendant's estate has been obtained in a State court, and the defendant afterwards goes into bankruptcy, proceedings under State statute will not lie before a State officer against defendant for discovery of his estate, similar to those given by section 5086 of the Revised Statutes of the United States; they must be taken in the Bankruptcy Court.

Where such proceedings are taken before a State officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a United States court, where the decree of the State court is not for a fiduciary debt of the bankrupt.

Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.

IN June, 1876, a decree was rendered by the Circuit Court of Accomac County, Virginia, in favor of William H. Walters and Mary E. E. Walters, infants, for \$4500, against their guardian and his sureties, one of whom was Samuel T. Taylor, in a suit in chancery for a settlement of the guardians' account. Execution was issued upon this decree which proved unavailing, but established a lien upon the estate of Taylor. In the course of time, steps were taken under section 5, chapter 184 of the Code of Virginia (p. 1180), to elicit from Taylor by interrogatories, before Montcalm Oldham, a commissioner in chancery of said Circuit Court, a disclosure of his estate; the object of the proceeding being to make good the lien of the decree against the estate of Taylor when discovered.

On the 25th April, 1877, Taylor filed his petition in bankruptcy and was adjudicated one, and received from the register a certificate of protection.

On the 9th day of May, 1877, he was arrested under an attachment issued by said Oldham, commissioner, to compel him to answer interrogatories filed in said Circuit Court of Accomac, as before described, and held in prison by the county

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sheriff. On application to the judge of said court for release on *habeas corpus*, his petition was refused, for the reason as stated by counsel, that the State judge was of opinion that the jurisdiction for that purpose was in the Bankruptcy Court. On the 11th June, 1877, Taylor petitioned the judges of the United States Circuit Court for a writ of *habeas corpus*, which was awarded by the circuit judge, and on these proceedings the matter was heard by the district judge at Norfolk, the sheriff of Accomac County having brought the petitioner before the court, and made return according to the facts already stated.

HUGHES, J.—The first inquiry is, as to the jurisdiction of Commissioner Oldham to take the proceedings against Taylor, the petitioner, which are mentioned in the return made by the sheriff, the object of which is the enforcement of the lien of the decree of the complainant, obtained upon the estate of Taylor in the suit of *Walters, etc., v. Byrd et al.*, a copy of the record of which is filed with the sheriff's return, the validity of which lien is not disputed. It is a proceeding by one creditor of the bankrupt in another court, analogous to that which is given the assignee in bankruptcy in the Bankruptcy Court, by sections 5086 and 5104 of the Revised Statutes of the United States. The proceeding of this commissioner raises the question, which court has jurisdiction to ascertain and liquidate liens upon the estate of the bankrupt, and to require the bankrupt to make discovery of his estate. The question would seem to be answered in the mere statement of it.

Section 711, Revised Statutes of the United States, gives the United States courts jurisdiction exclusive of the courts of the several States, amongst other things, over

"all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; the collection of all the assets of the bankrupt; the ascertainment and liquidation of the liens thereon; the adjustment of the various priorities and conflicting interests of all parties," etc., etc.

Ancillary to this jurisdiction, section 5086 empowers the District Court, "on the application of the assignee in bankruptcy,

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or of any creditor, or without any application, at all times to require the bankrupt to submit to examination, under oath, upon all matters relating to the disposal or disposition of his property."

Therefore, the Bankruptcy Court not only has exclusive jurisdiction over the estate of the bankrupt, but of all "*proceedings*," such as that in question, looking to a liquidation, among others, of the lien of the decree of the complainants in the writ of *Walters, etc., v. Byrd et al.*; and those creditors have even more ample power to probe the bankrupt's conscience and obtain a disclosure of his estate in the Bankruptcy Court, than they could have in the proceeding taken against him by Commissioner Oldham, even if that proceeding were legal.

That such a proceeding before a State officer, when against a debtor after he files his petition and is adjudicated in bankruptcy, is illegal, seems to me to be as clear as any proposition of law can be. The proceeding before Commissioner Oldham being illegal and nugatory, the petitioner (the bankrupt), is not legally in the custody of the sheriff of Accomac.

II. The second inquiry is, as to the jurisdiction of this court to discharge the bankrupt from the illegal custody. Section 5091 provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." So that the only question on this latter head is, whether or not the obligation of a surety upon a guardian's bond is one from which a bankrupt is released by his discharge in bankruptcy. There can be no doubt on this subject. The obligation of the guardian is a fiduciary one, from which the guardian himself could not be discharged in bankruptcy; but that of the surety is not *fiduciary* within the terms and meaning of section 5117 of the Bankruptcy Law. The language of that section is, that no debt of a bankrupt "created while acting in a fiduciary character, shall be discharged under this act,"—language which refers only to the fiduciary himself, and not his sureties.

The prisoner must therefore be discharged; but I will at once

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require him to submit, before the register in bankruptcy, to such interrogatories as the creditors in the decree of the State court shall desire to propound.

*Circuit Court of the United States, Eastern District of Virginia,
at Richmond, September, 1877.*

S. LISBERGER v. E. M. GARNETT, ASSIGNEE, ETC.

A petition against a bankrupt and against his sureties, in a bond for goods seized, who were not otherwise parties to the bankruptcy proceedings, may, if in substance a bill, be remanded to rules, and proceeded in as a bill in chancery on the equity side of the United States District Court.

A stock of goods of an involuntary bankrupt, charged to have been sold fraudulently, was seized by the marshal under an order of the Bankruptcy Court. By subsequent order of the same court, the goods were delivered to the purchaser on his giving bond with sufficient surety to answer any order of the court in respect to the transaction.

A petition was filed by the assignee, charging that the sale was fraudulent, and praying that it might be set aside and the value of the stock of goods paid to him as assets for distribution, making the purchaser and his sureties parties defendant.

This petition was heard finally after the decisions of the Supreme Court were rendered in *Smith v. Mason* and *Marshall v. Knox*; and the court ordered that it be dismissed as a petition and remanded to rules as a bill, to be heard after plenary proceedings. On petition to the Circuit Court for revision of this order, it was by that court affirmed.

The petition having matured as a bill, was afterwards heard finally, and a final decree entered, declaring the sale of the stock of goods to have been fraudulent; and requiring the purchaser to pay the value of them as fixed by the decree with interest from the day of the fraudulent sale, to the assignee in bankruptcy.

On appeal to the Circuit Court from this decree, the same was affirmed.

It was unnecessary for the Circuit Court to decide, and therefore it did not decide, whether the original summary proceeding by petition in bankruptcy against the purchaser of the goods and the sureties on his bond given for the possession of them when they were seized, was valid as against those parties.

On appeal from the District Court.

On the 17th day of June, 1870, Storrs Brothers, and Blair & Thaxton, claiming to be creditors of Engle & Son, filed their petition in the District Court, alleging the commission of sundry

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acts of bankruptcy, and praying that said firm be adjudicated bankrupts.

The petitioners also alleged that the principal assets of Engle & Son consisted of a stock of goods, which had been sold to one S. Lisberger; that the sale was in fraud of the Bankrupt Act, null and void, and it was prayed that an injunction might issue, to restrain Lisberger from disposing of the goods, and that a warrant of seizure might issue to the marshal. The restraining order, and the order for the seizure, were issued and executed on the day the petition was filed, and they were issued and executed without exacting from the petitioners any bond or other security.

On the 18th of June, 1870, Lisberger petitioning therefor, it was ordered that the goods be restored to him upon his executing a bond, with security, in the penalty of \$8000, conditioned for the forthcoming of the goods, or the value thereof, upon the order of the court. The bond thus required of Lisberger was given, and the goods were returned to him, his bondsmen being M. Rosenbaum and Waggoner & Harvey.

The case remained in this posture until the 12th day of April, 1871, when E. M. Garnett, alleging that he had been substituted, as assignee, in the place of one Brown, filed his petition "*In the matter of Storrs Bros. et al. v. Engle & Son in bankruptcy*," in which he alleged that he had been appointed and had accepted the position of assignee of said Engle & Sons, who had been adjudicated bankrupts, and that an assignment of the estate of said bankrupts had been made to him, but that their schedules exhibited no assets whatever, except individual property, furniture, etc., claimed as exempt. It was also charged that the sale to Lisberger was void under the Bankrupt Act. The petitioner then set forth the seizure of the goods by the marshal, their release upon delivery of the forthcoming bond, and prayed that Lisberger be ordered to deliver up the goods, or pay the value thereof, and in case of non-delivery, to make good any loss on account of sales subsequent to his purchase, and in default of such payment by Lisberger, that he and his sureties on the forthcoming bond be required to pay "the amount therein promised," and if the value should exceed the amount of the bond, then that Lisberger be required to pay such excess in value.

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Petitioner finally prayed that Lisberger and his sureties upon the bond might be made defendants, and required to answer the petition on oath, and that such further relief might be granted as is conformable to equity and the nature of the case.

On the 6th May, 1871, Lisberger appeared and demurred to the petition, upon the ground, set forth in the demurrer, that the petitioner had no right to proceed against defendant by petition, or any other form of summary proceeding, and that the remedy, if any he had, was by bill in equity or action at law.

The demurrer was overruled, and on the 8th of May, Lisberger, still objecting to the jurisdiction, answered, denying the material allegations of the petition. There were several trials of the facts in issue before a jury subsequently to this, but the jury disagreed at each trial.

So that upon this state of pleadings the case stood, without further order therein, until the 16th day of June, 1874, when upon the motion of Lisberger, the judge of the District Court dismissed the petition for want of jurisdiction with an order for his costs.

On the 11th of July, 1874, however, an order was passed in the bankruptcy suit, in which is recited the fact that the court had, on the 16th day of June, 1874, dismissed the petition, and then it is stated that the assignee having, on the 19th of June, 1874, moved for a rehearing of Lisberger's motion to dismiss, which motion to rehear was continued until the 11th of July, and the court being then willing to entertain said motion, with the view of amending the petition in bankruptcy, so that it might be filed at rules and be proceeded in as a bill in chancery, fixed the 16th day of July as the day for such rehearing, and directed that copies of the order should be served on Lisberger and his counsel.

On the 8th day of October, 1874, another order was passed, in which, after reciting continuances of the motion to rehear, the order dismissing the petition was set aside, and the petition filed April 12th, 1871, being regarded in substance as a bill in equity, it was ordered so to stand, to be proceeded with as such, and to that end it was directed that the cause be sent to rules that process issue against the defendants, and that the cause be

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regularly matured according to law. In March, 1875, there is an entry at rules by the clerk, to the effect that subpoenas had been served on defendants, and there being no appearance or answer, complainant's bill was taken for confessed, and the cause set for hearing at the next term of the court. Meantime, Lisberger had appealed from the order of the District Court, of October 8th, 1874, setting aside the dismissal of the petition, etc., to the Circuit Court in the exercise of its supervisory jurisdiction; which order, upon appeal, was, in all respects, affirmed. On the 7th of March 1876, Waggoner & Harvey pleaded their discharge in bankruptcy. Lisberger demurred, pleaded the statute of limitations, and answered. Rosenbaum never appeared. In these proceedings the suit was conducted as a suit in equity.

On the 10th of May, 1876, a final order or decree was entered. The court, overruling the defence of the statute of limitations, and being of opinion that the sale was fraudulent in law as to the creditors of Engle & Sons, decreed that Lisberger should pay to the plaintiff the sum of \$5618.12, with interest from the 16th of May, 1870.

The following are the principal orders of the District Court, which are referred to in the arguments of counsel and in the decision of the Chief Justice.

ORDER OF THE 11TH JULY, 1874.

In this cause, the court having on the 16th of June, 1874, at the instance and on the motion of S. Lisberger, entered an order dismissing the petition in bankruptcy of E. M. Garnett, assignee of said Engle & Son, heretofore filed in this cause against said Lisberger and others, for want of jurisdiction in bankruptcy, and the said assignee, E. M. Garnett, having by counsel moved on the 19th of June, 1874, for a rehearing of the said Lisberger's motion to dismiss, and of the aforesaid order made thereon, which motion of the said assignee has been continued until to-day, and the court being willing to entertain the said assignee's motion for a rehearing, with a view to amending the said petition in bankruptcy, so as to make it a bill in chancery, in order that it may be sent to rules, to be proceeded in as a bill in chancery, doth

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hereby appoint the 16th day of July, instant, at the United States Court room at Richmond, at the hour of 10 A.M., for the rehearing aforesaid, and for the hearing of any other motion that may be made by any of the parties to the cause.

And it is directed that a copy of the order be served on the said S. Lisberger, and one also be mailed to E. Y. Cannon, Esq., of Richmond, and to L. H. Candler, Esq., of Washington City, counsel in this cause.

ORDER OF 8TH OCTOBER, 1874.

In this cause, the pending motion in which, adjourned from the 17th day of July, 1874, to the 8th day of September, instant, has been continued until this day, the court having maturely considered the said matter, is of opinion that a rehearing of the said motion of the said S. Lisberger for a dismissal of the said petition of said E. M. Garnett, assignee of Engle & Son, should be and the same is hereby granted; and the court being satisfied that the said order of the 16th day of June, 1874, entered at the instance of said Lisberger, dismissing said petition, was erroneous in not directing it to be proceeded with as a bill in chancery, doth set aside the same; and, considering that the said petition of said assignee, filed on the 12th day of April, 1871, is in substance a bill in equity, and ought under the circumstances, in furtherance of justice, to be so regarded and treated, the court doth order that the same do stand and be proceeded in as a bill, and for that purpose that the cause be remanded to rules, and process be issued against the defendant, and the cause be regularly matured according to law.

ORDER OF 10TH MAY, 1876.

The court having maturely considered this cause upon the papers formerly read, and upon the arguments of counsel, is of the opinion that the concurrent jurisdiction of a court of equity to set aside a conveyance or transfer of property made in fraud of the 35th and 39th sections of the Bankrupt Act, is not ousted by a like jurisdiction of a court of common law in such cases, doth sustain the jurisdiction of the court in this case, and the

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court having in the matter of *Storrs Bros. and others v. Engle & Son*, by a decree entered on the 7th day of October, 1874, ordered that the petition therein filed by the said Edgar M. Garnett, assignee of said Engle & Son, against said Lisberger & Son, on the 12th day of April, 1871, should be considered and treated as a bill filed by the said assignee against the said parties, and the Circuit Court of the United States for the Eastern District of Virginia, on appeal to its supervisory jurisdiction in bankruptcy, having by a decree entered on the first day of November, 1875, and certified to this court, in all respects affirming the said decree of this court, and ordered and decreed that said petition should be considered and treated as a bill as of the day the said petition was filed, and there being no appeal from the said decree of the said Circuit Court, the court is of opinion that the matter of said ruling is *res adjudicata*, and doth proceed to consider and treat the said petition as a bill filed on the said 12th day of April, 1871, and doth overrule the objection of the statute of limitations thereto.

And the court, proceeding to dispose of the case on its merits, is of opinion that the transfer on the 16th day of May, 1870, by said Engle & Son, who were retail dealers, of their whole stock of goods in bulk to the said Lisberger at fifty per cent. of their invoice prices, was under the circumstances fraudulent in law, and void as to the creditors of said Engle & Son, the court doth accordingly so declare and decree.

And the court, being of opinion from all the evidence in the cause, that the price, to wit, \$5600, alleged to have been paid by S. Lisberger for the stock of goods in the proceedings mentioned is as much as could have been realized therefrom by any other method of sale, doth therefore adjudge, order, and decree that the said S. Lisberger do pay to the plaintiff the said sum of five thousand six hundred and eighteen dollars and fourteen cents, with legal interest thereon from the said 16th day of May, 1870, until paid, and the costs by the plaintiff in this behalf expended, and that execution issue for the same in accordance with the 8th rule of practice of the equity courts of the United States as promulgated by the Supreme Court.

Argument for the appellant.

The case was argued by Messrs. Legh R. Page and E. Y. Cannon for Lisberger, the appellant; and by Messrs. John Howard and Robert Stiles for Garnett, assignee.

For the appellant, it was insisted by Mr. Page:

1st. That the order for the seizure of the goods, claimed by Lisberger, and in his possession, the seizure and the bond exacted of him for their forthcoming, etc., all of which actings and doings were had in the bankruptcy suit against Engle & Son, to which Lisberger was no party, were absolutely null and void. *Smith v. Mason*, 14 Wallace, 419; *Marshall v. Knox*, 16 Wallace, 555; *Marsh et al., Executors, v. Armstrong*, 11 N. B. R. R., 127.

The bond thus taken could not be made the foundation of a suit, either by petition, bill in equity, or action at law. Such seems also to have been the opinion of the learned judge of the District Court, as he did not decree against either of the sureties on the bond.

2d. Lisberger not being a party to the suit in bankruptcy against Engle & Son, could not be proceeded against as their grantee, except in a plenary suit, either at law or in equity. This proposition is fully sustained by the authorities just cited, and by the case of *Wiswell et al. v. Campbell, Assignee*, decided at the last term of the Supreme Court of the United States, and not yet reported. (See 3 Otto, 347.)

Chief Justice Waite, delivering the opinion of the court in the case last mentioned, says:

"The circuit and district courts have concurrent jurisdiction of all suits in law or equity, brought by an assignee in bankruptcy, against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee (Rev. Stat., sec. 4979), but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in aid of such proceeding, but while progressing, they are separate from and independent of it. They are used by the Bankrupt Court to settle the rights of parties who are not subject to its jurisdiction, and who, therefore, cannot be affected by any judgment or decree that may be made in that cause."

The petition here was designed to drag into the suit in bank-

Argument for the appellant.

ruptcy a stranger who claimed and possessed personal property adversely to the assignee, and to subject him and his rights to the summary power and jurisdiction of the Bankrupt Court.

In *Eyster v. Gaff et al.*, 91 U. S. Rep., at p. 525, Mr. Justice Miller, speaking for the whole court in regard to such proceeding, said: "This court has steadily set its face against this view."

But it is said, and the learned judge of the District Court seems to have entertained the opinion, that the petition of the assignee in the bankruptcy suit might be regarded as substantially a bill in equity. It was certainly not so considered by those who drafted it. It was not separate from, and independent of, the suit in bankruptcy, but was filed, and for years dealt with, as a part of the bankruptcy proceeding. There was no prayer for process, and none was ever issued. The assignee indorsed on the petition that he had served copies of it upon the parties therein named as defendants, but we know of no law recognizing an assignee in bankruptcy as an official authorized to certify papers filed in the United States courts, or to serve copies of such papers as process to bind parties in judicial proceedings. At the time of these proceedings the Bankrupt Court of this district was eminently an ambulatory court, and the persons upon whom Mr. Garnett says he served copies of the petition were not informed when or where they were to appear and answer. Those parties were not bound to give heed to such a summons, and none of them did regard it, except Lisberger, who, admonished by the unlawful seizure of his goods at the beginning of the bankruptcy suit against Engle & Son, deemed it prudent to appear and challenge such a method of contesting his rights of property. It is true that when his demurrer was overruled he did answer, but in his answer he still objected to the jurisdiction.

If the case set up in the petition, although presented in that questionable shape, had been one of purely equitable cognizance, and the appellant had voluntarily submitted to the jurisdiction, or perhaps if he had not seasonably objected, he might be held bound by the order or decree against him. But no such case is exhibited by the record. The petition was not separate from, or independent of, the bankruptcy, and could as well be treated as

Argument for the appellant.

an action in trover as a bill in equity, and could as well, if not better, be tried by a jury than by a chancellor, even with the aid of a master.

We submit, therefore, that the order of the district judge dismissing the petition and adjudging costs to Lisberger was plainly right, and fully justified by the authorities already referred to.

3d. The order of October 8th, 1874, setting aside the previous order dismissing the petition, with leave to the assignee to file the petition at rules as a bill in equity, and directing process to issue against the persons therein named as defendants, if it can have any legal effect whatever, should be regarded merely as an adjudication, that the dismissal of the petition was without prejudice to the assignee's right to file a bill.

There is undoubtedly ground, from the face of the order and the subsequent action of the district judge, for the belief that the court intended that it might be treated as a bill from the date it was filed as a petition, and yet it is manifest, from an inspection of the order, that it was considered by the court that the petitioner had to begin *de novo*, file the paper in question as a bill, and have process issued and served according to the rules and practice of a court of equity.

Those directions, made at the instance of petitioner, were literally followed by him. Writs of subpoena in due form were issued and served, and as to the parties upon whom process had been executed the petition was taken as a bill confessed, and when afterwards they answered, they were required to answer anew, as if the petition were an original pleading, although it was unchanged in form or substance, and was the identical paper that so long had slumbered in the bankruptcy suit against Engle & Son.

Why were these steps taken, if the petition in the bankruptcy suit was a bill in equity, and, when taken years after, will the assignee be heard to say that from the beginning he had been a suitor in equity, especially when it was objected at the threshold that his proceeding was unlawful?

Parties litigant are not allowed to blow hot and cold after that fashion, and their adversaries, upon every principle of fairness,

Argument for the appellant.

should be entitled to know at once when, in what forum, and under what system of procedure they are to make defence.

If such somersaults are permissible in courts of justice, and the idea is to obtain that the petition was a bill from the date of its filing, then we insist that a court of equity has no power to grant a rehearing except upon petition for that purpose, properly filed, and after due notice to the parties to be affected by the rehearing.

The 88th equity rule prescribes the mode in which a rehearing is to be asked. It is enough to say, without quoting the rule, that no one of its requirements has been gratified in this case. When the order dismissing the petition, at the cost of the assignee, was passed, the defendant was discharged from further attendance at court, and all proceedings had thereafter, in his absence and without his consent, were *coram non judice*. After that order of dismissal, the next we hear of the case is from the order of July 11th, 1874, in which it is stated that a *motion* for a rehearing had been made on the 19th of June, 1874, and that the court being then (the 11th day of July) willing to hear such motion, the rehearing thereof was fixed for the 16th day of July. From the order it also appears that it was then, for the first time, considered that Lisberger, or his counsel, were entitled to be heard upon the motion, and it was therein directed that copies of the order should be served on him and his counsel. If the suit were in equity, a motion, as we have seen from the 88th rule, was not the proper proceeding to set aside a final decree, and if it were, at least some record of the motion should have been made at the time, but the record fails to show such entry, and fails also to show that Lisberger or his counsel did have notice. If it be admitted, in accordance with the very truth of the case, that the petition was designed and treated as a part of the bankruptcy suit, both by counsel and the court, it is easily understood how the court could, in a summary manner, set aside its judgments or orders at any time during its pendency, after proper notice.

Until the petition was filed at rules, as a bill in equity, there was not a single step taken in conformity to the rules and practice of a court of equity. They were all had upon the theory

Argument for the appellant.

that the District Court was exercising its ordinary jurisdiction in bankruptcy, and was always open, without regard to terms of court, to hear the assignee.

It has been suggested that the appellant is estopped to question the correctness of the order setting aside the dismissal of the petition, and directing it to be filed as a bill, because, upon appeal to the supervisory jurisdiction of the Circuit Court, that order was in all respects affirmed.

In reply to this view, it would seem sufficient to say, that if the case were in equity, the Circuit Court had no power to exercise a supervisory jurisdiction in the premises. It could only be removed to the Circuit Court by a formal and regular appeal. *Wiswell et al. v. Campbell et al., Assignee, etc.*, cited *supra*, and authorities therein referred to. The effect of the order of affirmance was merely to declare that the Bankrupt Court was right in treating the petition as a suit in equity. Thereupon the District Court sanctioned its prosecution as such a suit. It was no more than an interlocutory order in the cause, subject to a review upon an appeal from the final decree.

4th. If the order setting aside the dismissal of the petition was right and proper, and the petition is to be regarded as a bill from the day it was directed to be filed as such, then we say the assignee's right of action was barred by the limitation of two years prescribed by section 5057, Rev. Stat. This plea is highly favored in the administration of bankrupt estates. *Bailey v. Glover*, 21 Wallace, 342.

5th. It is further submitted that the final order or decree of the District Court is erroneous, because there was no ascertainment of the debts of the bankrupts. The adjudication in this case, founded on such imperfect notice to the bankrupts, if valid, undoubtedly establishes their insolvency against all persons, but the fact of their insolvency is not alone sufficient to authorize the decree. For aught that appears to the contrary the amount decreed against Lisberger may be largely in excess of the debts proved, and the amount of debts proved is the measure of the assignee's right of recovery. The surplus belongs to Lisberger, the sale being valid as to Engle & Son, and only void as to their creditors, to the extent of the debts established against them.

Argument for the appellee.

A review of the decision of the District Court, upon the questions of fact, is not asked for by the appellant, as the evidence in the cause is very conflicting.

So much of Mr. Howard's printed argument as related to the two principal questions in the cause is given below:

I. *The sole question now before this court, upon the pleadings, is as to the sufficiency of the bill.*

The District Court having, by its order of the 8th of October, 1874, directed the paper filed by Garnett, assignee, on the 12th day of April, 1871, to be considered and treated as a bill in equity, and that order having been affirmed in all respects by the decree of this court of the 1st of November, 1875, and that paper having been accordingly considered, treated, and proceeded upon in the District Court as a bill in equity filed as of the day of its date, the sole and simple question before the court upon the pleadings now open for discussion is, whether or not that paper is in substance a good and sufficient bill.

All the other questions sought to be raised are clearly matters which belong to the said proceedings of *Storrs Bros. and others v. Engle & Son*, pending in the District Court in bankruptcy, and those proceedings are not now for review or correction at all before this court, sitting as a court of equity on appeal, in a separate and independent case.

This simple statement, if true, eliminates from consideration the great bulk and gravamen of the argument on the other side. And is it not true? There is no dispute that the District Court, in the proceedings in bankruptcy, acquired jurisdiction *over Engle & Son and their estate, and over the assignee of its own appointment*. Whatever defect of process there may have been, if any, Engle & Son answered the petition of the petitioning creditors, Storrs Bros. and others, and upon full hearing and argument the allegations of the petition were found to be true, and they were regularly adjudicated bankrupts; and if there were any irregularities in those proceedings, or in the subsequent proceedings in that case, they were and are nevertheless valid and binding until set aside or reversed by a court of competent jurisdiction; and whether or not Lisberger was in any sense a party to those pro-

Argument for the appellee.

ceedings, this is as true of the said order of the 8th of October, 1874, as of any other order made in the case. In point of fact he was as much a party to those proceedings as Engle & Son, after the important *ex parte* order of the 18th June, 1870, by which he obtained, upon his own petition, possession of the goods of Engle & Son. He was represented by counsel, and hotly contested every order in the case touching him, as well the order of the 8th October, 1874, as the rest, and certainly, on his appeal from that order to the supervisory jurisdiction of this court, he was fully heard by counsel.

This court certainly had before it then, sitting as a court of supervisory jurisdiction, all that it is now sought to bring before it again in respect to those proceedings, but with this difference, that then it had jurisdiction to revise and correct what, if anything, was erroneous in the said order of the 8th October, 1874, and the orders preceding it, in effect involved in that order, whereas now it has nothing to do with the matter. The whole question of the jurisdiction of the District Court to enter said order was at that appropriate time fully discussed and considered, and this is the decree of the court :

“ Upon the hearing of the matter of the said petition, the court is of opinion that the District Court was of competent jurisdiction to consider and treat the paper styled a petition filed by the said Edgar M. Garnett, assignee of said Engle & Son, on the 12th day of April, 1871, as a bill in equity filed as of that day, and to direct process thereon as such, and that said District Court did not err in so considering and treating the same. And the court doth adjudge, order, and decree that the same be so considered, and that the said petition of the said Lisberger be dismissed with costs.”

Dated November 1st, 1875.

If this honorable court had jurisdiction to pronounce that decree, the decree itself was final and irreversible, for, having been made in pursuance of its supervisory jurisdiction over proceedings in bankruptcy, there was and is no appeal, and right or wrong, it must stand as the law of the case. See the cases collected in *Wiswell v. Campbell*, 3 Otto, 347.

That it did have such jurisdiction is as clear and as certain as that the District Court had acquired jurisdiction in bankruptcy

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over Engle & Son and their estate, whatever it was, and the assignee of its own appointment.

* * * * *

This view disposes of all the alleged irregularities and errors of the District Court in the proceedings in bankruptcy, even upon the supposition that Lisberger was not a party thereto; for whether or not he was a party to those proceedings, the court had jurisdiction to do what it did (in point of fact on his own motion), that is to say, refuse to litigate his rights in that case, and to direct that those rights should be litigated in a separate suit, the bill already filed in which it recognized as a bill in equity for that purpose.

If, however, this court, sitting in its supervisory jurisdiction, had no jurisdiction to enter the decree of the 1st of November, 1875, then clearly it must have been because the said paper, filed by the assignee in the District Court on the 12th April, 1871, was in contemplation of law a bill in equity from the first, and the case was not properly before this court at that time as an appeal from the equity jurisdiction of the District Court, but if that be so, then the said order of the District Court of the 8th October, 1874, treating said paper as a bill in equity, was confessedly right *ex hypothesi*.

So that Lisberger can take his choice:

If this court had jurisdiction to render its decree of November 1st, 1875, it was because it was sitting in supervisory jurisdiction, and upon that supposition its decree was final.

If this court did not have jurisdiction to render that decree, it was because the said paper was a bill in equity, and no equity appeal was pending before the court.

This argument has thus far proceeded upon the hypothesis that Lisberger was not a party to the suit in bankruptcy against Engle & Son.

It will now be shown that, in point of law and fact, Lisberger was a party, to all intents and purposes, to that suit, and, therefore, that the District Court had full jurisdiction over him in that suit for the purposes of said petition or bill, in whichever or in whatever aspect it may be considered.

1. On the petition and proofs of Storrs Bros. and others, the District Court had jurisdiction to enjoin interference with and

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to seize the property of Engle & Son charged to have been fraudulently transferred to Lisberger, and hold it provisionally until the question of fraud could be determined. See sections 1 and 40 of Bankrupt Act of 1867; Rev. Stat., sections 4972 and 5024. Indeed, unless this were so, the whole object of the law in many cases would easily be defeated by fraudulent transfers of their property by insolvents in contemplation of bankruptcy, and no stronger illustration of the necessity and propriety of such jurisdiction need be imagined than the facts of this case afford. Even a common court of equity would have had such jurisdiction to prevent the consummation of a fraud.

2. This being true, the goods were in *custodia legis* the moment they were seized, and though the proceedings had been irregular (which was not the fact), they would still have been valid, as the court had express, clear, and full jurisdiction over the subject-matter and the parties.

3. By his petition of the 18th of June, 1870, the day after the seizure, Lisberger voluntarily intervened. He came into court and placed himself upon the record as a *claimant of the goods*, denied the allegations of the petitioning creditors as to his fraud, and prayed that the goods might be delivered to him upon *condition that he would give bond and security for the forthcoming of the goods, or their value, to abide the order of the court*. He thus voluntarily became a party to the proceedings, so far certainly as that property was concerned. Even the sureties on his bond became thereby parties, or *quasi* parties, for the purpose of giving the court summary jurisdiction over them to compel a compliance with their obligations. Thus in *Blossom v. Railroad Company*, 1 Wallace, 656, the court say: "Sureties signing appeal bonds, stay bonds, delivery bonds, and receiptors under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their judgments or recognizances." Now if even the sureties, by signing the bond, became parties, and subjected themselves to the jurisdiction of the court, so that summary judgments might be entered against them, why not their principal also? It was for his benefit that the bond was given, and he is the principal obligor there-

Argument for the appellee.

in, and primarily bound. Nay it was upon the express condition of his giving the bond that he received the property in its stead, for the bond was but a substitute for the property, and whatever jurisdiction the court had over the property it has over the bond and the obligors therein by summary proceedings or otherwise. That the bond is but a "substitute for the property," is the very language of the Supreme Court in *Inbusch v. Farwell*, 1 Black's Rep., at p. 572, where it was so held in the case of property released on attachment—"the bond," says the court, "becomes a substitute for the property released."

But, in point of fact, Lisberger, before giving the bond, had already voluntarily made himself a party to the proceedings, so far as the property was concerned, and subjected himself to the jurisdiction by coming in by petition and denying the allegations of the petitioning creditors in respect to the fraudulent transfer of the property to him, and claiming it as his own, thereby putting in issue, as between the complainants and himself, all questions touching such fraudulent transfer; and, as the court had already rightly acquired full jurisdiction of the property by its lawful seizure, so now, by the voluntary appearance, pleading, and claim of the intervenor, Lisberger, it acquired full jurisdiction over him in respect to the claim he asserted. This is the common course of practice in all judicial proceedings, notably in admiralty and in all other proceedings, or *quasi* proceedings, *in rem*, and in none more properly than in proceedings in bankruptcy. In courts of equity the same principle applies and the same practice obtains. Thus, in the above-cited case of *Blossom v. Railroad Co.*, 1 Wallace, 656, after the sentence above quoted, the court, in further illustration of the rule that parties, by voluntarily dealing with the court, make themselves parties to the proceedings and become subject to its jurisdiction, proceed to add, "So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court, these are at liberty to come before the master after the decree, and establish their claims to share in the distribution." And if this can be done, as it is done in every-day practice, why cannot any party come in before decree and claim the property or fund as his own? And if in the one case he becomes a party

Argument for the appellee.

to the proceedings, and subjects himself to the jurisdiction, why not in the other? Everybody knows that nothing is more common than this course of things in all kinds of legal proceedings, except those strictly at common law; and now, by statute in most of the States, similar proceedings by way of interpleader are expressly authorized and regulated in courts of common law.

Now, if a court of admiralty, of equity, or of common law, should turn over property lawfully under its charge to an intervening claimant asserting title thereto, such as a mortgagee or alleged purchaser, without notice of defect of title, upon condition of bond and security to have the property or its value forthcoming to abide the order of the court, would such intervening claimant be heard to say that he was not a party to the proceedings, and not subject to the jurisdiction of the court? Would he be heard to say, after submitting his claim to the court, that the court could not determine that claim, but that of necessity litigation as to that matter must be remitted to another forum and a different suit, and the court in the meantime be left powerless for the protection of the property and of the rights of the parties thereto, at whose suit it was lawfully taken into custody? After having, upon suitable representations, and by submitting to the jurisdiction, obtained possession of the property, and given bond as its substitute, would it not be the coolest effrontery to deny that jurisdiction to enforce the bond? And if the court has jurisdiction to enforce the bond, must it not have jurisdiction to determine the preliminary question whether it ought to be enforced, and thus necessarily all questions touching the true ownership of the property? Otherwise, obviously, the trick of getting possession of the property ousts the jurisdiction, by an appeal to which alone the trick was possible.

The plain and elementary truth is, that any court of competent jurisdiction which lawfully gets possession of property may lawfully hold on to it, or its representative, to answer the ends of justice. And whoever, in court or out of court, interferes with that possession, challenges and subjects himself to the process of the court to compel him to do what is right, by restoration or compensation, and will not be heard to question the *title of the court*, until by such means or by such order as the court may

Argument for the appellee.

prescribe, he shall have purged himself of the contempt of intermeddling with its lawful authority and the property under its control. If this were not so, the authority and dignity of courts of justice and the safety of property under their lawful charge would be at the mercy of the fraudulent and the lawless, as it has been in this case.

In this case the property was already under the jurisdiction and within the custody of the court, and so remained after the bond was given as much so as it was before, the bond being its substitute and representative, and the only legal effect of the petition, appearance, and claim of a claimant was to put the claimant and his claim also under the jurisdiction and make them subject to the orders and process of the court, as any other party and claim. In *Minnesota Co. v. St. Paul Co.*, 2 Wallace, 634, the Supreme Court say: "It would indeed be very strange if these parties can come into court by petition, and get possession of that which was the subject of litigation, and then when the wrong they have done by that proceeding is corrected, they shall be permitted to escape by denying that they were parties to the suit. In the case of *Blossom v. The Milwaukee and Chicago Railroad Co.*, 1 Wallace, 655, this matter was fully discussed," etc., etc. (Cited *supra*.)

It would be a strange and abnormal anomaly, if there was anything in the jurisprudence of the law of bankruptcy, and the jurisdiction conferred upon courts of bankruptcy, so peculiarly engaged in the administration of insolvent estates and the detection and prevention of fraud, and singularly combining in their legal nature and operation the elements and powers of courts of admiralty and courts of equity—to except, exempt, and distinguish such a court from the otherwise universal and fundamental rules, principles, and practice of courts of justice in respect of property lawfully under their charge. Accordingly no such anomaly exists. On the contrary, the reverse has been expressly decided by the Supreme Court. In *Wiswell et al. v. Campbell et al.*, 93 U. S. R. (3 Otto), 351, the court, through Mr. Chief Justice Waite, say: "Every person submitting himself to the jurisdiction of the Bankrupt Court in the progress of the cause, for the purpose of having his right in the case determined, makes him-

Argument for the appellee.

self a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceedings. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences." But if a creditor who only claims a part of the bankrupt's estate, subjects himself to the jurisdiction, why not a petitioner who comes in and *claims the whole*, demands its allowance, and gets possession of it upon condition of having it or its value forthcoming when required by the court? Did the District Court oust its jurisdiction by the very act of best preserving it—by taking bond and security as a substitute for the property?

And after the court, by the adjudication in bankruptcy, had adjudged the transfer by Engle & Son of their whole stock of goods to Lisberger to be fraudulent and void, was it less competent to enforce the bond than it would have been to hold on to the property? And after it had thus determined the transaction to be a fraud upon the creditors, was it powerless to prevent Lisberger from committing a fraud also upon itself by first getting the whole estate of the bankrupts out of its possession, and then denying its right to hold him responsible therefor, although he had solemnly bound himself under hand and seal to respond to its orders? To such a case *Smith v. Mason*, 14 Wallace, 419, and *Marshall v. Knox*, 16 Wallace, 551, had no application. Those were cases in which persons claiming adverse rights to the assignee were strangers to the proceedings in bankruptcy, and it was sought by summary process on petition to bring them before the court and require them to litigate their rights in the bankrupt suit, and it was held that the court had no jurisdiction for such purpose. But those decisions themselves expressly except cases in which such persons voluntarily appear in the bankrupt suit, and ask its aid, and thereby submit to its jurisdiction.

The case in principle is like that of *In re Ulrich*, 3 B. R. R., 133, in which it was held by Blatchford, J., that after a stranger had voluntarily appeared in a bankrupt suit, it was too late for him to object to the jurisdiction, having waived the objection by his appearance, which appearance he was not permitted to withdraw, though alleged to have been made under a mistake. Here Lisberger voluntarily appeared, and was already a party when

Argument for the appellee.

the assignee's petition was filed, and it was too late for him then to object to the litigation of his claim in that suit, in any proper manner the court might adopt. And recent adjudications of the Supreme Court have now fully established the point that strangers by voluntarily appearing in a bankrupt suit and invoking its aid, become parties thereto, and will not be heard to deny the jurisdiction they have thus set in motion as to themselves, and from which they have sought and obtained advantage. In *O'Brien v. Wild*, 92 U. S. R. (2 Otto), 83, 84, execution creditors in whose behalf the sheriff had levied execution and held lawful possession of property under process from a State court, issued before the bankruptcy of the debtor-owner, came into the bankrupt suit, by petition after the adjudication of the debtor-owner as bankrupt, and prayed that the terms of the sheriff's sale might be modified, and that the proceeds of sale might be brought into that court, which was accordingly done, and it was held that the intervenors had thereby made themselves parties to the bankrupt suit, and were bound by the proceedings therein. And while recognizing *Smith v. Mason* and *Marshall v. Knox*, the court distinguished those cases from that of a claimant who, of his own motion, comes into a bankrupt suit and gets orders at its hands, and decided that to such a case the principle of those cases did not apply. And, as we have seen, following *O'Brien v. Wild*, is *Wiswell v. Campbell* (*supra*), in which the general principle applicable to every court of competent jurisdiction over a subject-matter of litigation, that any person who seeks its aid submits himself to its power, was fully and clearly recognized and illustrated.

The present, it is submitted, was a stronger case than either of these for the application of this principle. In the exercise of an undoubted jurisdiction, the court had seized the whole stock of trade charged to have been recently transferred by the bankrupts in bulk to Lisberger in fraud of the Bankrupt Law and of their creditors, and held it provisionally until the question of fraud could be examined, in order that it might not be made way with or disposed of by Lisberger, who was daily selling off the stock. While the property was thus lawfully in possession of the court, and Lisberger had lawfully been placed under in-

Argument for the appellee.

junction from interfering with it, he voluntarily appeared by counsel, and upon petition filed, and affidavit as to the value of the goods, obtained an order from the court surrendering to him the property upon condition of his giving bond and security for its forthcoming to abide the orders of the court. If, under these circumstances, a solemn obligation to abide the orders of the court did not subject him to its jurisdiction in respect to that property, which had thus been released to him upon that express condition, it is difficult to conceive how any claimant, by intervening and dealing with a court, can become a party to its proceedings, and subject to its dominion.

But, if Lisberger was a party to that suit, unquestionably he is bound by the order of the 8th of October, 1874, affirmed on appeal to the supervisory jurisdiction of this court, from which there is no appeal. That order could not have been the subject of appeal to the equity jurisdiction of this court; no such appeal has in form been attempted; what could be done directly will not be permitted to be done indirectly; and therefore the decree of this court of the 1st of November, 1875, stands as the law of this case, and the matter is *res adjudicata*.

II. *If the order of the 8th of October, 1874, was re-examinable by this court, on this appeal, there was no error in it of which Lisberger could complain.*

Undoubtedly, if the views above presented are well founded, it was perfectly competent for the District Court to have determined, in the bankrupt suit, to which Lisberger had thus submitted himself, what were his rights, if any, to the whole estate of the bankrupts which he claimed, and what were the rights of the assignee of the bankrupt in respect thereto. Indeed, as he had thus become a party by his said action and the action of the court on the 18th of June, 1870, when, a few days thereafter, to wit, on the 23d of June, 1870, by the adjudication in bankruptcy, the court decided that the transfer of the said goods to Lisberger was, under the circumstances, fraudulent and void as between Engle & Son and their creditors, in legal effect it necessarily decided also that the transfer was fraudulent and void as between Lisberger and the creditors. . . .

Nay, I go further. Without the permission of the court, and,

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perhaps, also the acquiescence of Lisberger, the assignee would have had no right to litigate Lisberger's claim in a separate suit. No suit certainly could have been brought on the bond until there was breach of the condition ; and there could be no breach of the condition until Lisberger had failed to have the property or its value forthcoming upon the order of the court. And as the bond was but a substitute for the property, the principle of *Taylor v. Carryl*, 20 How., 583, applied, and no other jurisdiction could lawfully have interfered with the possession of the court over the subject of litigation, or with its jurisdiction to determine the rights of the parties in respect thereto. And the assignee, who was an officer of the court, was the last person who could have instituted a separate suit to determine those rights elsewhere. And as to Lisberger, it has ever seemed to me in the highest degree questionable whether, if without any suggestion on his part and without an order from the court, the assignee had originally brought a separate suit in another forum to recover from him the value of these goods, a plea to the jurisdiction would not have availed him, upon the ground that the whole matter was *sub judice* in the bankrupt suit in which he had appeared, and had bound himself, under bond and security, as a substitute for the property to have it or its value forthcoming to abide the order of the court, and that thus he could not be made subject to two different jurisdictions, in two different suits, at the same time, for the same thing—the court first acquiring jurisdiction having the right to hold on to it for the purpose of determining the matter in controversy. And I conceive that if Lisberger had not objected to the jurisdiction of the Bankrupt Court, and had not required litigation in a separate suit, and thus estopped himself from objecting to such other litigation, it would have been difficult, if not impossible, to answer such a plea in a separate suit in another forum.

Having ever entertained these views, when, upon the succession of his honor, Judge Hughes, to the bench, in 1874, Lisberger's objection to the jurisdiction in the bankrupt suit was renewed, I did not fail fully to present them, together with the authorities above cited, in their support (except *O'Brien v. Wild* and *Wiswell v. Campbell*, not then decided); but upon the au-

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thority of the supposed ruling cases of *Smith v. Mason* and *Marshall v. Knox*, then unexplained, and, as I venture to think, little understood, as indeed were the sections of the acts of Congress under construction (in consequence of which the whole practice in the different district courts had become unsettled and conflicting), his honor, Judge Hughes, felt constrained to sustain the objection, and hence his order of the 16th of June, 1874, dismissing the petition of the assignee for want of jurisdiction. An omitted part of the record would show that an appeal to the supervisory jurisdiction was entered and perfected by the assignee, and that it was subsequently abandoned in accordance with a provision of the Bankrupt Act allowing such a course to be taken. The jurisdiction for such abandonment is sufficiently indicated in the subsequent orders of the court.

Being of opinion that the court had no jurisdiction in the bankrupt suit to litigate Lisberger's claim, his honor seeing the nature of the transaction, and the hardship and loss which would fall upon the creditors, if their rights should be pretermitted to forms and technicalities, adopted a course in furtherance of justice which had been recommended by the practice of other courts, and which has now been sustained by the Supreme Court (*Stickney v. Wilt*, 23 Wallace, 150) in treating and considering the petition of the assignee as in substance a bill in equity, and following a suggestion in one of the cases, directed process to issue upon it accordingly as a bill. . . .

I thought that course to be unnecessary, because I thought the court had full jurisdiction to litigate the claim in the bankrupt suit. But in my judgment, while that was true, the court was not compelled, under the circumstances, to exercise that jurisdiction, and if Lisberger insisted upon separate litigation, it was entirely competent to the court to grant it. It had jurisdiction of the subject-matter and of the parties, and it was, as I thought, simply a question of practice, a matter of convenience and discretion, whether it should allow the claims to be litigated in that suit, or be more formally litigated in another and independent suit. It chose the latter course, and of its own suggestion. In legal substance, the so-called petition of the 12th of April, 1871, contained all the essential elements of a bill in equity, as will be

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shown, and by its order of the 8th of October, 1874, the District Court merely, in effect, determined that instead of being mixed up with that suit, it should be disconnected with it and be formally proceeded in as a separate case. It eliminated the case from the bankrupt suit. That was, in my view, the whole substance and legal effect of the order. Its practical effect, though it led to delays, was eminently just. Instead of appealing, when his demurrer to the petition was overruled by Judge Underwood, and then have had the question of jurisdiction definitely decided by the appellate court, Lisberger had pleaded over, and filed an elaborate answer, and upon issues joined, had several times gone to the jury upon the facts. There could, therefore, operate no surprise or injury to him in remitting the controversy for settlement to a separate suit upon the petition considered as a bill presenting the same issues, in the same words. The court at last granted his prayer. That was all. But if he wanted a separate suit, he must take it upon such terms as would not operate a fraud upon others. The separate suit, in legal effect, had already been brought. It had been interposed in the bankrupt suit, and the court, instead of hearing the two suits together, had separated them, each to stand as of the date of its origin.

In directing the petition to be considered and treated as a bill, the court simply recognized the petition as a bill. It did not direct it to be converted or changed into a bill. It required no change to make it become what, in reality, it already was, in substance and effect. Nor did the court direct it to be filed. It had already been filed—filed under the order and with the approval of the court, indorsed in the handwriting of the judge, on the 12th of April, 1871. Had it been necessary, indeed, such is the large jurisdiction and liberal practice in amending, moulding, and controlling pleadings, in furtherance of justice and the prevention of injustice, exercised by all courts, and especially by all courts administering justice upon equitable principles and under the flexible forms of equity procedure, the District Court might well have ordered the petition to be reformed and converted into a bill by suitable amendments of form.

But no amendment of form, much less of substance, was, in the judgment of the court, required here, and none was made.

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On the contrary, the court adopted and considered the petition as a bill, perfect in all essential respects, as was done in *Stickney v. Wilt*, 23 Wallace, 150.

Sitting in bankruptcy, in the bankrupt suit, with all the analogous powers and jurisdiction certainly of a court of equity, in that suit, over the parties thereto, and having also express and special equity jurisdiction, ancillary and supplementary to that jurisdiction, it would indeed be strange if the District Court had not jurisdiction to determine whether a paper filed in it by one of its officers, by its own order, and with its own approval, was or was not a bill in equity, and should be treated as such. That was the question decided by the order of October, 1874, affirmed by this court by its decree of the 1st of November, 1875.

If there was error in the order, it was error of which the assignee might have complained, but of which Lisberger certainly had no ground to complain. It gave him what he all along demanded—a separate suit. He was duly served with process, appeared by counsel, pleaded to and answered the bill, took testimony, and was fully and fairly heard. He has himself thus treated the petition as a bill, and has now appealed to this court from the decree rendered upon it as a bill, and if it be not a bill, this court has no jurisdiction, on appeal in equity, to hear his appeal.

WAITE, Ch. J.—On the 16th of May, 1870, Engle & Son, merchants, doing business at Richmond as retailers, sold their entire stock of goods to Lisberger.

On the 17th June, following, Storrs Bros. and certain other creditors of Engle & Son commenced proceedings in bankruptcy against them in the District Court for this district, and upon filing the petition obtained an order of court directing a seizure by the marshal of the goods sold, which were then in the possession of Lisberger at the store formerly occupied by Engle & Son. In obedience to this order the marshal took the goods into his possession, and thereupon Lisberger at once filed his petition in the Bankrupt Court, asking that they might be restored to him upon his giving bond with security, conditioned

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for the forthcoming of the goods or the value thereof, to abide such further order as might be made in the premises.

The prayer of this petition was granted June 18th, and on the same day Lisberger, with the defendants, Rosenbaum, Waggoner, and Harvey as his sureties, executed the required bond in the penal sum of eight thousand dollars, and received the goods from the marshal. June 23d, Engle & Son were adjudicated bankrupts, and in due time one Brown was appointed assignee. He instituted some proceedings against Lisberger to set aside the sale and recover the goods or their value, but his conduct in the premises not being satisfactory to the creditors, he was removed by order of the court, and Garnett, the present complainant, appointed in his place, April 4th, 1871. On the 12th of April, Garnett filed in the District Court a petition entitled *Storrs Bros. et. als. v. Engle & Son*, in bankruptcy, and addressed to Hon. J. C. Underwood, district judge, setting forth the proceedings in bankruptcy, his appointment as assignee, the sale to Lisberger, with the necessary averments to show that it was in fraud of the Bankrupt Law, the seizure of the goods by the marshal, and their subsequent restoration to Lisberger upon the execution of his bond, and concluding as follows:

"Your petitioner therefore alleges the said sale, transfer, or conveyance to the said Lisberger to have been fraudulent under the Bankrupt Law, . . . null and void, and that the said stock or its value are assets in his hands for the purpose of discharging the indebtedness of Engle & Son, and he prays that the said Lisberger be ordered to deliver up the said property or to pay the value thereof at the time of the conveyance to your petitioner, and in case of the delivery of the goods to make good the loss which has accrued by reason of sales subsequent to said fraudulent transfer or conveyance, and in default of said payment or delivery by the said Lisberger, that he and his sureties in the above-mentioned delivery bond, be required to pay the amount therein promised, but in this event your petitioner prays that the said Lisberger himself be required to pay in addition to the amount fixed in said bond, whatever additional value your petitioner shall be able to prove said stock of goods to have been worth at the time of said transfer to Lisberger, inasmuch as the

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penalty of said bond was fixed by the court upon ex parte affidavit, at a sum as your petitioner really thinks far below the actual value of the stock. Your petitioner finally prays that said S. Lisberger, M. Rosenbaum, J. J. Waggoner, and Wm. G. Harvey be made parties defendant to this petition, and be required to answer the same on oath, and that such other and further relief be granted as is conformable to equity and the nature of his case."

Copies of this petition were served on each of the persons named as defendants, and they appeared and demurred, alleging for cause "that the petitioner has no right to proceed against the defendants by petition or any other form of summary proceeding, and that the remedy of said petitioner, if any he have, is by bill in equity or by action at law in the district and circuit courts."

This demurrer was overruled by Judge Underwood, then the district judge, May 6th and, May 8th, Lisberger, not waiving the demurrer, filed an answer denying all the allegations as to the fraudulent character of the sale under the Bankrupt Law. The case was several times tried by Judge Underwood with a jury, but upon every trial the jury disagreed. After the death of that judge and the appointment of Judge Hughes as his successor, a motion was made by Lisberger to dismiss the petition for want of jurisdiction, which was granted June 16th, for the reason that the matter in issue was not triable under a petition in the bankruptcy suit; but June 19th the assignee filed a petition for a rehearing of the motion. July 11th the court "being willing to entertain the motion of the assignee with a view to amending the said petition in bankruptcy so as to make it a bill in chancery, in order that it may be sent to rules to be proceeded in as a bill in chancery," appointed July 16th for the hearing, and directed the service of a copy of the order thus made upon Lisberger and the counsel in the case. October 8th, 1874, a rehearing was granted, and "the court being satisfied that the said order of the 16th of June, 1874, entered at the instance of said Lisberger, dismissing said petition, was erroneous in not directing it to be proceeded with as a bill in chancery, doth set aside the same, and, considering that the said

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petition of said assignee, filed on the 12th of April, 1871, is in substance a bill in equity, and ought, under the circumstances, in furtherance of justice, to be so regarded and treated, the court doth order that the same do stand and be proceeded in as a bill, and for that purpose that the cause be remanded to rules, and process be issued against the defendants and the cause regularly matured according to law."

Under this order, subpoena was issued January 7th and served on the defendants, Lisberger and Rosenbaum, January 11th, 1875. No new service was made upon the other defendants.

At the March rules, 1875, an order that the bill be taken *pro confesso* in default of appearance and answer, was duly entered in the order book.

November 1st, 1875, the order of the District Court under date of October, 1874, was affirmed by this court upon a petition for review, filed by Lisberger under the supervisory jurisdiction.

March 7th, 1876, Harvey and Waggoner, two of the defendants, appeared, and by leave of the court filed an answer setting up a discharge in bankruptcy subsequent to their execution of the delivery bond. To this a general replication was filed by the assignee. On the same day Lisberger appeared by counsel and, on leave, filed a paper in the cause, which is styled a demurrer, plea, and answer. In this paper it is insisted by way of demurrer, "that the petition does not present such a case as entitles the complainant to relief in equity;" and by way of plea, "the limitation [two years] prescribed by section 5056 of the Bankrupt Act." Then, without waiver of his demurrer or plea, he answers denying all the allegations in the petition of fraud in the sale. For this purpose he adopted his answer, filed May 8th, 1871, previous to the order transferring the cause to the equity side of the court. He denied his liability upon the bond for want of consideration, and insisted that all proceedings in the cause since June 17th, 1874, were irregular and without authority of law.

The complainant joined in the demurrer, and replied generally to the answer proper and to the answer in the nature of a plea.

Depositions were taken, and, May 10th, 1876, after hearing,

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the District Court overruled the demurrer and plea, and, upon the merits, entered a decree avoiding the sale and directing the payment of \$5618¹⁴/₁₀₀, the ascertained value of the goods, with interest from May 16th, 1870, by Lisberger to the assignee.

No mention is made of the bond in the decree, and no order was made in respect to any of the defendants except Lisberger.

Both parties have appealed from this decree.

I am entirely satisfied, after a careful examination of the evidence, that the sale to Lisberger was void under the Bankrupt Law. Indeed, the counsel for the defendants, in their arguments here, have not seriously contended to the contrary. It is unnecessary, therefore, to consider the case at length in that aspect.

The real controversy is as to the defence of the statute of limitations; and that depends entirely upon the time when the suit was commenced. If this was April 10th, 1871, when the petition was filed, the defence fails. If, however, it was January 11th, 1875, when the subpoena was served on Lisberger and Rosenbaum, or even as early as October 8th, 1874, when the order was made setting the cause down for hearing upon the equity side of the court, the statute does operate as a bar.

The pleading filed in the District Court April 12th, 1871, was in an appropriate form for a petition for relief under the summary jurisdiction of the court sitting in bankruptcy. It was entitled as of the principal suit in bankruptcy, and was addressed to the district judge generally, without specifying the particular jurisdiction invoked. It was, however, equally good, in substance; as a bill in equity. It needed no amendments to make it available under the order of October 8th, 1874, for it contained a full statement of the cause of action and a sufficient prayer for complete relief in equity. Although for a time the court acted upon the petition as if addressed to its jurisdiction while sitting in bankruptcy, and the complainant insisted that this was the correct practice, upon further consideration it was decided that the case was one to be determined only as a suit in equity, under the special jurisdiction for that purpose conferred by the Bankruptcy Law. Accordingly, it was assigned for hearing in that branch of the court. No new pro-

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cess was necessary, for the parties were already in court by their appearance under the notice already served. The question decided did not relate to the commencement of a new suit, but to the mode of procedure in one that had been already commenced.

In *Stickney v. Wilt*, 23 Wallace, 150, decided by the Supreme Court in November, 1874, just after the order of October 8th, 1874, was made in this case, the petition was in all matters of form the same as this. It was entitled as of the bankrupt suit, was addressed generally to the judge of the District Court, and had no prayer for subpoena.

The District Court having directed the sale of certain property by the assignee, free from all incumbrance set up by Wilt, he filed in the Circuit Court a petition for review under its supervisory jurisdiction. The Circuit Court, after hearing, reversed the order of the District Court, sent the cause back with instructions to allow the claim of Wilt and proceed accordingly. From this action of the Circuit Court an appeal was taken to the Supreme Court, where it was decided that notwithstanding the form of the petition filed in the District Court, it contained all the essential elements of a bill in equity, and as the subject-matter of the action was one cognizable only by the District Court, under that provision of the Bankrupt Law which gave it jurisdiction of suits at law and in equity in respect to the property of the bankrupt, that court must be considered, in the absence of anything expressly appearing to the contrary, to have acted under that jurisdiction when it granted the relief complained of. For this reason it was held that the remedy of Wilt was by appeal to the Circuit Court, and not by petition for review under its supervisory jurisdiction, and that the action taken by the Circuit Court was irregular and of no effect, because of the want of power in the court to proceed in that manner with such a case. As, however, what the court did was under an assumed supervisory jurisdiction, the Supreme Court did not dismiss the appeal, but sent the cause back with instructions to the Circuit Court to dismiss the petition for review for want of jurisdiction, and suggesting to the District Court the propriety of entertaining a bill of review in equity for the purpose of correct-

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ing any errors that might be found in the decree as originally entered there.

As it seems to me, that case is decisive of this. There, as the suit was one properly cognizable in equity only, the Supreme Court presumed it was heard and determined as such. Here the court at first proceeded summarily with the cause, treating it as a part of the principal suit in bankruptcy; but before it was finally disposed of, corrected the supposed error and set the matter down for hearing as a suit in equity. Thus was expressed what might have been implied under the ruling in *Stickney v. Will*.

It is not necessary to inquire whether the court was correct when it decided that it could not take jurisdiction of the case upon a petition filed under the suit in bankruptcy. It is sufficient for all the purposes of this appeal that such was the decision, and that it was made at the instance of the defendant, Lisberger, himself. Certainly power to proceed in that way did not divest the court of its jurisdiction in equity; and if it did proceed in equity Lisberger cannot complain, because it was at his instance that this power of the Bankrupt Court was not employed.

It is, however, contended that the case was finally disposed of and the defendants discharged from further attendance when the order of dismissal was entered on the 16th of June. That order was avowedly made in the bankrupt suit. The motion was entered in that suit by Lisberger to dismiss the case from that jurisdiction. Any order made in the progress of such a suit could be vacated or modified by the Bankrupt Court upon proper showing at any time before the suit was finally disposed of, provided rights had not become vested under it which would be disturbed by the change. The Supreme Court has so decided in *Sandusky v. National Bank*, 23 Wallace, 293. Here, no such rights had intervened, and the Bankrupt Court, upon application duly made, and after notice, vacated the order as one improvidently entered. This left the case in the District Court to be proceeded with in such manner as might be proper. Lisberger certainly made himself a party to the bankrupt suit for all purposes connected with his motion, and was consequently amenable to any process that might be

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necessary to correct errors in the action which he in that way secured for his own benefit.

I conclude, therefore, that the defence of the statute of limitations cannot be sustained, and that the case was properly in the District Court for adjudication, as a suit in equity, when the decree was rendered.

One further suggestion only, made by the defendants against an affirmance of the decree, remains to be considered. It is claimed that before there can be a recovery against the defendants, the amount of debts owing by the bankrupt must be ascertained. This I do not consider necessary. The schedules which are filed as evidence show an indebtedness far in excess of the value of the goods. This certainly makes a *prima facie* case for recovery. The presumption is that all debts will be proved if there are assets for distribution. But, be that as it may, as the sale is void under the Bankrupt Law, and some debts have been proven, the assignee is entitled to his decree, leaving the defendant to make good his claim, if any he has, to any surplus that may remain after the debts are satisfied. It follows that the decree must be affirmed under the appeal of Lisberger.

The complainant has, however, appealed, and insists that the value of the goods was greater than was found by the District Court.

The evidence upon this branch of the case is quite unsatisfactory. It consists almost exclusively of the estimates of witnesses which are to my mind very unreliable. If the case had not been so long pending I would send it to a master, but it is very doubtful whether at this late day any more satisfactory testimony could be obtained than that which is now here. There is nothing to show what the general character of the stock was, whether new or shopworn; but when the order for its restoration to Lisberger was made, the goods were in the possession of the marshal, and subject to the inspection of all parties interested. At that time a bond with a penalty of eight thousand dollars was considered sufficient to protect the creditors against loss. Under these circumstances I am inclined to concur in the opinion of the district judge, and to adopt the valuation fixed for the purpose of the sale as the amount of the recovery.

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As it seems to be conceded that the goods cannot be restored to the assignee, let a decree be prepared finding the sale to Lisberger void under the Bankrupt Law, and ordering him to pay the assignee \$5618¹⁴/₁₀₀, with interest from May 16th, 1870, as the value of the goods in lieu of their delivery; and, in default, that execution issue as at law. As to the other defendants, the bill is dismissed without prejudice to the right of the complainant to proceed against them at law upon the bond in case it shall become necessary. Lisberger to pay all costs below and here.

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In regard to merchants, traders, bankers, and others who employ negotiable paper in their business, insolvency consists in being unable to pay and failing to pay such paper at maturity, 208.

In regard to farmers and others who are not merchants, traders, or bankers, insolvency consists in owing more than the value of the debtor's estate, 208.

INSURANCE COMPANIES.

1. Right to remove a cause to United States Circuit Court given by Revised Statutes, section 639, not affected by Virginia Code of 1873, ch. 87, sections 19 to 36, 822.
2. A judgment sustaining a demurrer, under 3 Otto, 240, will not prejudice plaintiff's right to amend, so as to claim the equitable value of the policy arising from premiums paid before a forfeiture by non-payment of premiums due during the war, 822.
3. They may through an agent make an implied waiver of a provision in their policy contrary to the express terms of such provision, 290. See *Agent*, 3.

INTEREST.

1. Legislative provision allowing an abatement of interest during the war not unconstitutional, 207.
2. United States district courts may therefore require judgment creditors to abate it for that period in conformity to a State law, 238.
3. Does not run during a war as between citizens of the two belligerent powers, 310.
4. A pledge for the payment of a certificate of debt is a pledge for the payment of interest as well as principal, 17.
5. A State may by law require the abatement of interest on existing debts without violating the article of the National Constitution forbidding States to pass laws impairing the obligation of contracts, 207.

INTERNAL REVENUE.

SNUFF and *granulated tobacco* mentioned in Revised Statutes, section 3368, are not synonymous terms, 326.

JUDGMENT AT LAW.

1. Against a judgment rendered against a defendant, which was not contested through neglect or mistake of his counsel, equity will not relieve, 148.

JUDGMENT AT LAW (*continued*).

2. Where docketed judgment has been marked "*satisfied*" by the creditor under a mistake, a bill in equity will lie to annul and set aside the *satisfaction*, 169.

JURISDICTION.

1. United States court has jurisdiction if a State is not a party of record, though she be a party in interest, 17.
2. United States court may enjoin the misapplication of money from a State treasury, but, after it has been paid, cannot require the use of other funds to make it good, 24.
3. Where a mortgage creditor files a bill for foreclosure, charging that the trustees will not proceed to foreclose, and they come in and are made parties to the bill, and the jurisdiction of the United States court is thereby defeated, the bill will be dismissed, 29.
4. Where one court of competent jurisdiction has determined that a patent has not been violated, it may enjoin the complainant against bringing suits for infringement elsewhere against the defendant, 65.
5. Where a plea to the jurisdiction of a circuit court, founded upon irregularity of the process, has not been taken, and the defendant has appeared, pleaded to issue, and gone to trial, another United States court will treat the judgment as valid, 67.
6. Where a United States district court is invested with circuit court powers, it has those powers only in the territory of the particular district named in the act of Congress, and neither the judge for the circuit nor the justice for the circuit can sit in such district court, 67.
7. A cause cannot be removed from a United States circuit court into such a district court, 67.
8. If *mandamus* be not a necessary remedy in a United States court, such court may entertain a bill in chancery, though in the same case a State court could not entertain such a bill, because *mandamus* would lie there as an eligible but not necessary remedy, 90.
9. If a company be incorporated in two States, a citizen of one State may sue it in the United States court of the other State, 90.
10. Citizenship in the District of Columbia does not give the right to sue the citizen of a State in a United States court, 118.
11. Conveyances of the interests of non-residents in the subject of a suit, merely for the purpose of giving jurisdiction to United States courts, do not suffice for that purpose, 118.
12. A United States circuit court has not jurisdiction, even in matters connected with bankruptcy, where a State is a plaintiff against one of its own citizens, 133.
13. A United States district court, in cases in which it has jurisdiction, may do, as a court of equity, just what the State court might do in equity, 232.
14. Such court may therefore scale confederate contracts to their value in national currency, 232.
15. Affirmation in declaration or bill of foreign residence is necessary to give Federal courts jurisdiction, 246.

JURISDICTION (*continued*).

16. It is competent in Congress to confer jurisdiction on the United States courts of suits brought against defendants non-resident in the district where the suits are brought, 813.

Congress has conferred this jurisdiction by act of March 8d, 1875, sections 2 and 4, 818.

17. Jurisdiction of the United States courts extends to Gosport Navy Yard and is exclusive there, 588.

LEGACIES.

Sums of money received by claimants under a deceased person's will, by virtue of a compromise contract with the executor, sanctioned by a court of competent jurisdiction, are not included in that class of "legacies" or "distributive shares" in intestate's estates, which are subject to a United States revenue tax, 298.

LEGISLATIVE GRANT.

The grant of a right to dig, mine, and remove certain minerals from the beds of the rivers of a State does not render invalid a subsequent grant in similar terms to other grantees, 72.

LIS PENDENS.

The purchase of land in Virginia which is the subject of litigation in a United States court is void, though the *lis pendens* be not recorded according to the provisions of the Virginia code on that subject, 78.

MANDAMUS. See *Jurisdiction*, 8, and p. 90.

NATIONAL BANKS.

A National bank has the right to make loans on negotiable notes secured by stock, or bonds having marketable value, 101.

A transfer of shares in a National bank made with intent to avoid the liability imposed upon shareholders by law for the debts of the bank, is void, 158.

NOTARY PUBLIC.

Though interested in a deed, a notary public may take the grantor's acknowledgment of it if the act be merely ministerial, 37.

OATH.

The mode of administering it, under section 864 of the United States Revised Statutes, is that of the State where the depositions were taken, 295.

This statute must be strictly construed, 295.

OBLIGATION OF CONTRACTS.

Not impaired by act of Virginia Assembly, allowing abatement of interest during the late civil war, 229.

ORDER OF ADJUDICATION.

In involuntary bankruptcy, based on a fraudulent preference, does not conclude the court in a bill brought by the assignee against the preferred creditor or beneficiary; the parties not being the same, and the defendant creditor or beneficiary not having been heard in the bankrupt court, 189.

PACKAGE.

Meaning of, in Revised Statutes, section 3430, 529.

PARTITION.

Bill in chancery does not lie for partition in favor of a complainant whose title to a portion of the property, sought to be partitioned, is not clear, 118.

PATENTS.

1. Whether one patent infringes upon another one is a question of fact to be determined by the evidence, 60.
2. Accurately constructed models are the best means, when they are practicable, to enable the court to judge of the infringement, 60.
3. The testimony of experts is controlling in the absence of models, 60.
4. Attachment for contempt for violation of patents will not be ordered unless the violation is clearly proven, 60.
5. Where one court of competent jurisdiction has determined that a patent has not been violated, it may enjoin the complainant against bringing suits for infringement elsewhere against the defendant, 65.
6. In patent cases, United States courts have a larger discretion in respect to interlocutory injunctions than in other cases of injunction, conferred by section 4921 of the Revised Statutes, 607.
7. The action of the Commissioner of Patents at Washington makes a *prima facie* case for or against granting injunctions, 608.

PETITION.

In bankruptcy may be treated as a bill and proceeded with on the equity side of the United States District Court, when, 620.

PLEA OF IMPRISONMENT.

Special plea of imprisonment not valid in a civil action, 313.

PREFERENCE IN BANKRUPTCY. See *Deed of Preference*, and 37.

1. A United States circuit court in trying the question of fraud connected with a preference under section 5128, MAY submit the question to a jury, 177.
2. A bill to set aside a preference given since June 22d, 1874, must charge that the person benefited by it *knew* it was given in fraud of the provisions of the Bankruptcy Act, 183.
3. A bill which omits to charge such *knowledge* will be dismissed where no proof of knowledge was presented, 183. See *Bill in Equity*, 2, 3, and 4, and pp. 183 and 188. See *Deposits*, 1, 2, and 3.

PROMISSORY NOTE.

When by mistake the maker of a note signed his name above the words defining the *place* of payment, in a printed form of note having printed coupons attached, the note is negotiable under the laws of Virginia, 172.

RAILROAD COMPANIES.

1. Not bound to hold goods at an interior depot for a consignor till consignee pays the purchase price, 343.
2. Have a right to assign particular cars to persons of particular color, without violating act of March 1st, 1875, 536.
3. When company is responsible for injury to an employé, 337.

RAILROAD CONSOLIDATION.

Where several railroad companies have been consolidated under one corporation for twelve months, if a stockholder in a divisional company brings a bill of injunction to restrain the further execution of the charter of consolidation and the use of the divisional railroad by the consolidated company, he must make the executive officers of the consolidated company parties defendant or the bill will be dismissed; and even if he should do so, temporary restraining orders will not be granted, 80.

REASONABLE CAUSE TO BELIEVE.

The execution of a deed of preference to secure a sum of money fraudulently overchecked from a bank by the criminal connivance of its teller, constitutes of itself reasonable cause to believe that the deed is in fraud of the Bankrupt Act, 48.

RECEIVER.

Secured creditors cannot dictate who shall be receiver; the court will consider the interest of all creditors in appointing, 28.

RECORDS.

Books of a distiller kept in accordance with sections 3303 and 3304 of the Revised Statutes are *quasi* records, 533.

REMOVAL OF SUITS FROM STATE TO FEDERAL COURT.

1. A County Board of Supervisors of Virginia is not a court, and a petition before them is not a suit, 270.
2. But when appeal is taken from them on such petition, such appeal is a suit in the county or corporation court, and such suit may be removed into a Federal court, 270.
3. Application for removal of such suit must be made at the first term of the State court at which the appeal could be tried, 271.
4. Right of insurance company to remove a cause under Revised Statutes, section 639. See *ante*, *Insurance Companies*, and p. 322.
5. Suits against revenue officers on account of acts done under virtue of their offices, may be removed from the State to the Federal courts, and act of March 3d, 1875, does not repeal section 643 of the Revised Statutes, 326. See *Jurisdiction*, 7, and p. 67.

RESTRAINING ORDER.

May be granted temporarily without notice in patent cases to prevent irreparable injury to complainant, 607.

RETAIL LIQUOR DEALER.

Meaning of in section 3242 of the Revised Statutes, 531.

RIGHTS OF ACTION.

Rights of action held by conquered power accrue to conqueror *jure belli*; *assumpsit* to conqueror implied, if *assumpsit* had existed in favor of the conquered power, 341.

RULE 88 IN EQUITY.

Is imperative and must be enforced, 163.

RULES OF PRACTICE.

Binding on suitors, counsel, etc., but subject to the discretion of court, 386.

Acts of the legislature depriving the court of this discretion are more than rules of practice, 386.

Section 914 of the Revised Statutes contemplates the former only, and not the latter, 386.

"SATISFACTION"

Of judgment—bill in equity will lie to set it aside, 169.

SECRETARY OF WAR.

A grant by act of Congress to the President of power to dispose of the full title to the fee in real property, implies the grant of all minor powers, and authorizes the Secretary to execute the deeds as agent, and by direction of the President, 138.

SEQUESTRATION.

Where stock in a Southern corporation belonging to Northern citizens was sequestrated during the civil war, though it passed to second hands, the sequestration was void as against the Northern shareholders, 69.

SETOFF.

Plea of setoff not a "suit at law," such as is forbidden by Revised Statutes, section 5105, to a creditor who has proved his claim in bankruptcy, 891.

Nor is plea of setoff a "suit" in contemplation of section 5105, 891.

SNUFF.

Not synonymous with *granulated tobacco* in the meaning of section 3368, United States Revised Statutes, 326.

STATUTE OF LIMITATIONS.

Statute does not run during a war as between citizens of the different belligerent powers, 310.

STATUTES.

1. The rule of law construing them to be in force during the whole of the day on which they are passed is a mere rule of convenience, and subservient to the justice of the case, 356.
2. A statute of Congress increasing taxes and denouncing penalties, and to take effect according to above rule, is an *ex post facto* law, 356.
3. Such statute takes effect at the moment it is approved by the President, 356.
4. Statutes of the United States passed in pursuance of the Constitution, supersede State statutes on the same subject, 415.

STOCKHOLDER.

Transferee of shares of a bank who owns such shares at time of suspension of bank, though only as collateral security, is liable to creditors of bank as a stockholder, 307.

STREETS AND WAYS.

The surrender of a street for public use by a proprietor of contiguous lands, is a surrender to be used as a wharf if the street terminated or binds on a bay or river, but it is not a surrender of the fee, 118.

SUITS.

See *Removal of Suits*, 1, 2, 8.

TENDER.

Tender by a relative or friend of the owner of the property, of the tax due upon property advertised for sale, is sufficient, 402.

THREATS.

Threats sufficient to induce an officer about to make an arrest to believe that the person will kill him, justify him in killing the person, 560.

TOBACCO FIXTURES.

Possession retained by vendor after sale not fraudulent *per se*, 239.

TRADE MARK.

A manufacturer has the right to the exclusive use of any word or numeral adopted arbitrarily as a trade-mark, where it is a mere symbol and not a term of description, 107.

The symbol $\frac{1}{2}$ may be so used, 107.

The word *Eureka* may be so used, 115.

TRUSTEES.

Where a mortgage creditor has filed a bill charging that the trustees will not proceed with the foreclosure, if the trustees thereupon come in for that purpose they control the suit, 29.

USER OF PROPERTY.

A contract perpetual in purport which gives a right to use property which is coupled with an interest necessary to the enjoyment of the property is not revocable by the grantor, 139.

VOTERS.

1. Qualifications fixed by the States, not by Congress, 448.

2. Congress has power to interfere for protection of voters at elections for Federal officers, 448.

WAIVER

Of provisions in policy by insurance companies, 290. See *Agent*, 3.

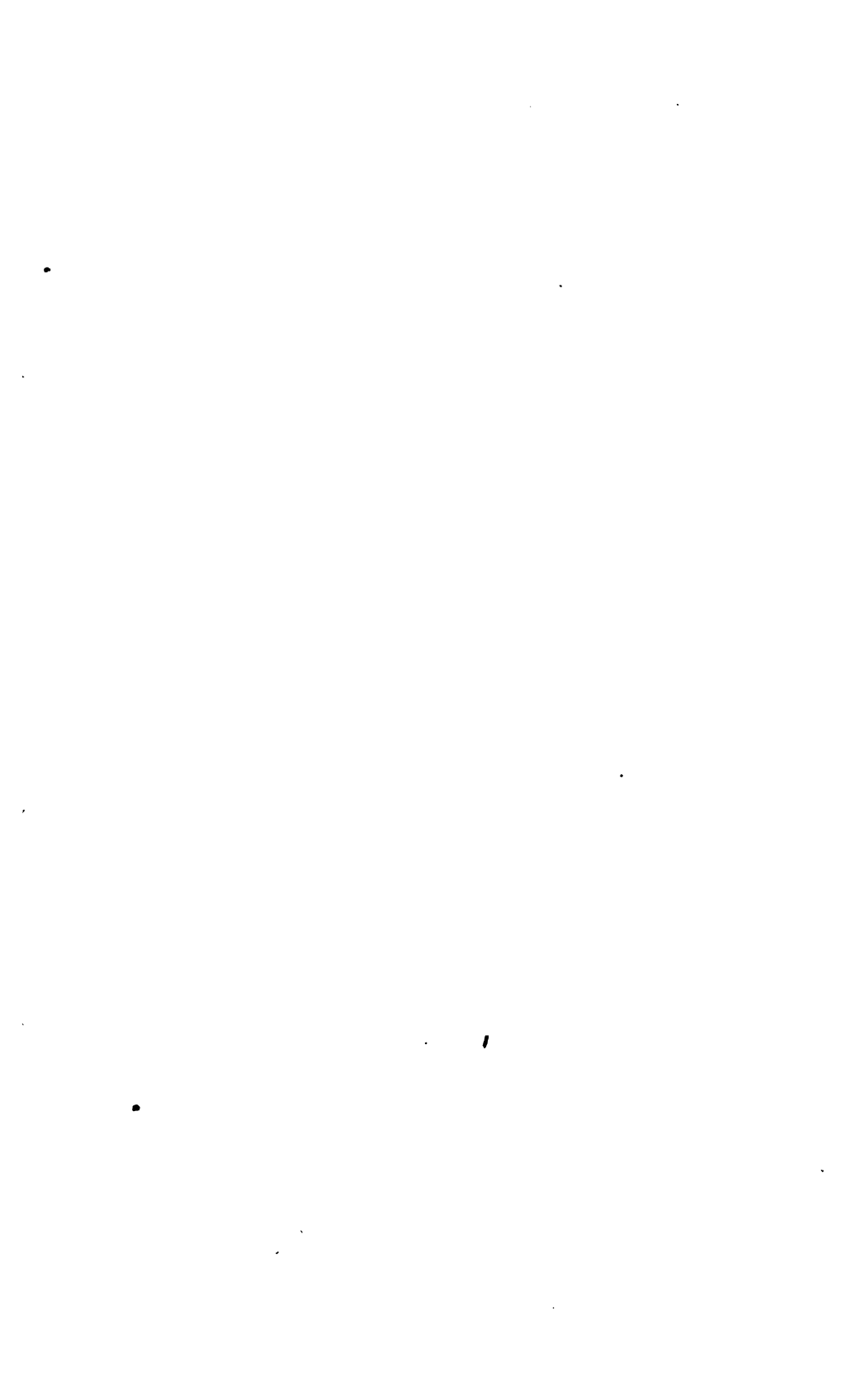
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